

CROSS-EXAMINATION - DR. CHANNING ROBERTSON

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1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
3 - - - - -
4 The State of Minnesota,
5 by Hubert H. Humphrey, III,
6 its attorney general,
7 and
8 Blue Cross and Blue Shield
9 of Minnesota,
10 Plaintiffs,
11 vs. File No. Cl-94-8565
12 Philip Morris Incorporated, R.J.
13 Reynolds Tobacco Company, Brown
14 & Williamson Tobacco Corporation,
15 B.A.T. Industries P.L.C., Lorillard
16 Tobacco Company, The American
17 Tobacco Company, Liggett Group, Inc.,
18 The Council for Tobacco Research-U.S.A.,
19 Inc., and The Tobacco Institute, Inc.,
20 Defendants.

21 - - - - -
22 TRANSCRIPT OF PROCEEDINGS
23 VOLUME 14, PAGES 2573 - 2876
24 APRIL 6, 1998

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1 P R O C E E D I N G S
2 (In-chambers conference was had as

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3 follows: )
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1 (In-chambers proceedings concluded.)
2 THE CLERK: All rise. Ramsey County
3 District Court is again in session, the Honorable
4 Kenneth J. Fitzpatrick now presiding.
5 (Jury enters the courtroom.)
6 THE CLERK: Please be seated.
7 THE COURT: Good morning.
8 (Collective "Good morning.")
9 THE COURT: Counsel.
10 MR. BLEAKLEY: Good morning.
11 (Collective "Good morning.")
12 BY MR. BERNICK:
13 Q. Good morning, Dr. Robertson.
14 A. Good morning.
15 Q. I'd like to turn --
16 We're getting towards the very end here, and
17 I'll try to move through the rest of this promptly.
18 But I'd like to turn to the subject of drug-delivery
19 devices for a moment.
20 Let me mark this one and get a clean one.
21 I take it in order to have a drug-delivery
22 device, you first of all need a drug. Fair?
23 A. Yes.

24 Q. And the delivery device is, then, a vehicle for
25 delivering the drug; right?

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1 A. That's one way to put it, yes.

2 Q. Now I believe you told us on your direct
3 examination that a drug -- that any substance that
4 would have a pharmacological effect when taken into
5 the body would qualify as, in your term, a drug; is
6 that correct?

7 A. Well I think that's a generally accepted
8 definition.

9 Q. And is it true that there are many, many
10 substances that, when taken into the human body, have
11 pharmacological effects?

12 A. There are many drugs.

13 Q. Okay. And is it also true that there are many
14 substances that, when taken into the human body, have
15 a pharmacological effect on the brain and the nervous
16 system?

17 A. There are many, yes.

18 Q. Okay. Now in this particular case, I think what
19 you have said is that tobacco has, when consumed, has
20 pharmacological effects; correct?

21 A. I said that when nicotine is consumed, it has
22 pharmacological effects.

23 Q. Nicotine is the portion of the tobacco, when
24 consumed, that has the particular pharmacological
25 effects that your testimony has been focused on;

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1 correct?

2 A. Nicotine in tobacco, yes.

3 Q. Now it's true, is it not, that the fact that
4 consuming tobacco has pharmacological effects has
5 been known for literally two, three hundred years?

6 A. Well certainly tobacco in some form has been
7 known to be used for hundreds of years, yes, for its
8 pharmacologic effect.

9 Q. And when it comes to nicotine in particular, am
10 I correct that nicotine was first isolated in about
11 1828?

12 A. As a pure compound?

13 Q. Yes.

14 A. That may be the case.

15 Q. And is it also true that by 1889, it was
16 determined that nicotine in particular has
17 pharmacological effects?

18 A. Are you referring to a document or a --

19 Q. Take a look at the Surgeon General's report.

20 A. Okay.

21 Q. 1988. It's the third in the stack in front of
22 you. That's in evidence as GK245. And if you take a
23 look at page ten.

24 A. Okay.

25 Q. Do you see where it refers to the fact that,
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1 "Since the late 1800s, research on the pharmacologic
 2 actions of nicotine has contributed substantially to
 3 basic information about the nervous system. The
 4 classic work which Langley and Dickinson (1889) on
 5 nicotine's effects in autonomic ganglia led to the
 6 postulates that chemicals transmit information
 7 between neurons and that there are receptors on cells
 8 that respond functionally to stimulation by specific
 9 chemicals."

10 That would be pharmacologic work on nicotine;
 11 would it not?

12 A. Yes.

13 Q. Now in the case of cigarettes, the vehicle for
 14 delivering the drug is the -- the cigarette package.
 15 Everything outside of the rod; right?

16 A. I don't follow you on that.

17 Q. Okay. I'm sorry. Let -- let me see -- we had
 18 the diagram here.

19 The device for delivering the nicotine is -- is
 20 this, it's the packaging of the tobacco; right?

21 A. It's the cigarette itself.

22 Q. Okay. And long before filters were put on, and
 23 ventilation holes and tipping paper and the like,
 24 people used to smoke cigarettes with just a wrapper
 25 around the tobacco rod; right?

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1 A. That's right.

2 Q. And for so long as cigarettes have existed, just
 3 a tobacco rod with a piece of paper around it, even
 4 roll-your-own, that would be a vehicle for delivery
 5 or a device; would it not?

6 A. Yeah. It's a primitive form of -- of that
 7 relative to the highly engineered systems that your
 8 clients make today.

9 Q. I understand.

10 So it would be fair to say that the fact that
 11 cigarettes are drug-delivery devices in the fashion
 12 that we're talking about it here; that is, something
 13 to deliver cigarette smoke that has these basic
 14 pharmacological effects, the fact that cigarettes are
 15 a drug-delivery device in that sense has been known
 16 literally for more than a hundred years; correct?

17 A. I don't know that it was -- has been referred to
 18 as a drug-delivery device during those times. What I
 19 do know is that according to your internal documents,
 20 that's the way your clients view it, as a drug
 21 delivery device, and that's the business that they're
 22 in.

23 Q. But if someone -- if someone were to be asked in
 24 1889 whether cigarettes are a drug-delivery device,
 25 based upon how you have defined device,

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1 pharmacological effects delivered through a vehicle,
 2 they would have said, "Sure, tobacco delivers
 3 nicotine. That's a drug." Is that right?

4 A. They would -- they would have said that after I

5 gave them a little lecture.
6 Q. Oh. The basic lecture of drugs and delivery
7 devices, they would have said, "Yes, cigarettes
8 deliver nicotine. They're drug-delivery devices."
9 It's not very -- it's not very complicated.
10 A. If I walked up to a cowboy in Deadwood, Wyoming
11 in 1885 and said, "You're smoking a drug-delivery
12 device," he'd probably shoot me.
13 (Laughter.)
14 Q. And it probably -- it probably wouldn't have
15 made a -- it probably wouldn't have made any
16 difference to that cowboy that he was smoking what
17 you call a drug-delivery device; would it?
18 A. If he was smart, he might have gotten into the
19 business before your clients did and make a whole
20 hell of a lot of money.
21 Q. Maybe he would have. But it would have made no
22 difference to him as a smoker that you are calling
23 what he was smoking a drug-delivery device; would it?
24 MR. CIRESI: Your Honor, it calls for
25 speculation as to what the unknown cowboy might or

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1 might not do.
2 (Laughter.)
3 MR. BLEAKLEY: He was -- he was the one
4 that brought the cowboy up.
5 MR. CIRESI: Well --
6 THE COURT: Let's -- let's get out of the
7 West, gentlemen, --
8 MR. CIRESI: Okay.
9 THE COURT: -- and get back into today.
10 BY MR. BERNICK:
11 Q. Very simple concept. Cigarettes deliver smoke
12 that has pharmacological effects, making them into
13 drug-delivery devices. Very simple concept; is it
14 not?
15 A. The concept is reasonably straightforward, yes.
16 Q. Okay.
17 A. The -- the implementation of that -- of that
18 concept, in any case, can be complex --
19 Q. Because it's sophisticated.
20 A. -- because it's a highly engineered,
21 sophisticated device.
22 Q. Sure. Let's talk about one other feature that
23 you mentioned in your testimony, which is regulating
24 dose; that is, that people, when they smoke, smoke in
25 a fashion that, using the different design features

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1 that you've pointed out, delivers a dose of nicotine.
2 You've referred to that in your testimony; have you
3 not?
4 A. I referred to it, and your documents referred to
5 it pervasively.
6 Q. Okay. Documents refer to it, you've referred to
7 it. Fair? Right?
8 A. They both --
9 We both have.

10 Q. Okay. And that's why you've talked about rate
11 controller, smoker controls dose. That's on your own
12 chart; is it not?

13 A. Yes.

14 Q. Okay. Now the fact --

15 The theory that smokers smoke to regulate dose,
16 that's been known and published since Johnston wrote
17 about it in 1942; correct?

18 A. Why don't you show me the Johnston document and
19 I can review it.

20 Q. Do you see the reference in the Surgeon
21 General's report, "Johnston (1942) concluded that
22 'Smoking tobacco is essentially a means of
23 administering nicotine, just as smoking opium is a
24 means of administering morphine'?"

25 A. Yes, I see that.

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1 Q. Okay. In point of fact, Johnston's article is
2 one where he essentially talks about -- he does an
3 experiment where nicotine was administered
4 intravenously in order to see whether it would have
5 the effect of reducing the number of cigarettes that
6 were smoked; correct?

7 A. Well I haven't read the article.

8 Q. Oh.

9 Let's now make a new column, and let's put in
10 this column "Alcohol." Is it a fact that alcohol has
11 pharmacological effects when it's ingested?

12 A. Yes.

13 MR. CIRESI: Objection, irrelevant.

14 THE COURT: You may answer that.

15 A. Yes.

16 Q. Is it a fact that the vehicle for delivering
17 alcohol is a glass with a mixture that creates the
18 reservoir for alcohol?

19 A. A glass or a bottle, a container of some sort,
20 yes.

21 Q. Is it also true that people control the amount
22 of alcohol -- or are supposed to control the amount
23 of alcohol that they consume?

24 A. They do that.

25 Q. Everybody's supposed to exercise judgment on

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1 when they have had enough to drink; correct?

2 A. It's up to the user.

3 Q. It's up to the user.

4 And if the user wants more dose of alcohol, you
5 can have a double, you can have two beers, two
6 glasses of wine, et cetera; correct?

7 A. Yes.

8 Q. Is it also true that caffeine has
9 pharmacological effects?

10 MR. CIRESI: Your Honor, we're going to
11 object to the relevance of this line of questioning.

12 MR. BLEAKLEY: Your Honor, they brought
13 this out through the documents. I can show you the
14 documents that they used to bring this out.

15 MR. CIRESI: We have not brought out what
16 caffeine is, what the manufacturers of caffeine were
17 doing. We're trying the cigarette case here, Your
18 Honor.

19 THE COURT: All right. I'll allow a brief
20 inquiry.

21 MR. BLEAKLEY: Okay.

22 BY MR. BERNICK:

23 Q. We could go through caffeine in soft drinks, a
24 double cappuccino, we could go through the same type
25 of presentation regarding caffeine, could we not;

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1 that is, there's a drug, a vehicle, and a way of
2 controlling the amount that's up to the consumer.

3 A. But there's a substantial difference.

4 Q. Could we go ahead --

5 A. Could I finish?

6 Q. Well if we can have an answer to the question
7 first, then we can put another question.

8 THE COURT: Counsel, please don't interrupt
9 the witness.

10 A. There's a substantial difference between a cup
11 of coffee delivering a dose of caffeine or a soft
12 drink, or a drink of alcohol, and the difference --
13 there's a couple differences. One, I personally do
14 not know that the manufacturers of soft drinks or
15 coffee or alcoholic beverages intend to deliver dose
16 amounts of those materials to the recipients, and I
17 suspect strongly that that's not the case since there
18 are, for instance, decaffeinated soft drinks and
19 decaffeinated beverages and coffees available. So
20 clearly they're not intending to achieve a certain
21 dose range. And besides that, caffeine and alcohol
22 don't kill over 400,000 people a year.

23 MR. BLEAKLEY: Move to strike the last
24 statement, Your Honor.

25 THE COURT: The last statement does not
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1 appear to be responsive.

2 BY MR. BERNICK:

3 Q. You can get decaffeinated soft drinks, you just
4 pointed out; right?

5 A. Yes, you can.

6 Q. And then if you want a caffeinated soft drink,
7 would we go to the can and find very specifically
8 listed the amount of caffeine that's present?

9 A. I don't know if that's true on all soft drinks.

10 Q. You don't think that soft-drink manufacturers
11 control the amount of caffeine they put in soft
12 drinks?

13 A. I have no knowledge of the manufacturing
14 processes of the manufacturers of soft drinks. I do
15 know that it must be manipulated in some way because
16 there are decaffeinated drinks available and there
17 are caffeinated drinks available.

18 Q. Ever read on a bottle of wine that it's got 12
19 percent alcohol by volume?

20 A. Yes.
21 Q. And the hard liquor has got -- it's stated in
22 proofs; correct?
23 A. That's correct.
24 Q. These are all regulations of the amount of the
25 drug that's being administered through those

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1 different tactics; correct?
2 A. And these are regulated.
3 Q. Regulated precisely by the manufacturer;
4 correct?
5 A. What about the Food and Drug Administration?
6 Q. Are they --
7 What about the Food and Drug Administration?
8 A. What kind of regulation do they have?
9 Q. I don't know. I'm not here to -- I'm not here
10 to tell you about the Food and Drug Administration.
11 I'm asking you a very specific question.

12 MR. CIRESI: And there is the point, Your
13 Honor.

14 MR. BLEAKLEY: This is an argument --
15 MR. CIRESI: This --
16 MR. BLEAKLEY: This is an argument by
17 counsel. I'm trying to ask the witness questions.
18 THE COURT: Counsel.
19 MR. CIRESI: Objection, irrelevant.

20 THE COURT: Okay. At this point it's
21 sustained. Let's move on.

22 BY MR. BERNICK:

23 Q. Okay. Given the nomenclature, these terms that
24 we have, isn't it a fact that as the internal
25 document -- this is Plaintiffs' Exhibit 2788, which

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1 is at tab two -- excuse me, volume two, tab 41. Mr.
2 Dunn's document.

3 MR. CIRESI: That's not the right exhibit
4 number, counsel.

5 MR. BLEAKLEY: Plaintiffs' Exhibit 2788?
6 MR. CIRESI: No. You're using a deposition
7 exhibit.

8 MR. BLEAKLEY: I'm --
9 What's the corresponding exhibit number?

10 BY MR. BERNICK:

11 Q. If you could turn to volume two, tab 41, Dr.
12 Robertson. 18089. Are you with me there?

13 A. I just want to take a look at this second.

14 Q. Sure. I'm going to draw your attention to page
15 six here in a moment.

16 Isn't it a fact that what Dr. Dunn pointed out
17 in "MOTIVES AND INCENTIVES OF CIGARETTE SMOKING" -- I
18 should say what William Dunn pointed out in "MOTIVES
19 AND INCENTIVES OF CIGARETTE SMOKING" was as follows
20 on page six. "Lest anyone be unduly" -- well, "Lest
21 anyone be made unduly apprehensive about this
22 drug-like conceptualization of the cigarette, let me
23 hasten to point out that there are many other
24 vehicles of sought-after agents which dispense in

25 dose units: wine is the vehicle and dispenser of
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1 alcohol, tea and coffee are the vehicles and
2 dispensers of caffeine, matches dispense dose units
3 of heat, and money is in the storage container,
4 vehicle and dose-dispenser of many things."

5 Isn't what Mr. Dunn is pointing out exactly what
6 we've pointed out here with regard to alcohol and
7 caffeine, at least in his view, Dr. Robertson?
8 A. As I said, I haven't had an opportunity to
9 review -- to peek into the citadel of secrecy that
10 would surround a soft-drink company or a coffee
11 company to begin to understand the intent and motives
12 for which alcohol and caffeine are in those
13 beverages, but I know for a fact in the cigarette
14 business it's in there to deliver dosage forms of
15 nicotine to the consumer. And your own documents
16 admit that without it you would have no business.
17 And your Next cigarette was a very good example of
18 falling right through the bottom of the dose-range
19 window.

20 Q. According to our own internal documents, Dr.
21 Robertson, Mr. Dunn's conceptualization of
22 cigarettes was the same conceptualization that he had
23 with regard to alcohol, tea and coffee.

24 A. And where does it say --

25 Q. Correct?

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1 A. Where does it say that he had access to the
2 internal documents of -- of those companies?
3 Nowhere.

4 Q. The soft-drink companies?

5 MR. BLEAKLEY: Your Honor, could I have an
6 answer to the question? I think he is not being
7 responsive. I'm asking him whether Dunn's
8 conceptualization --

9 THE COURT: Counsel, counsel, I believe the
10 answer was responsive to the question that was asked.
11 BY MR. BERNICK:

12 Q. Let's go on and talk for a moment about tar.

13 As science has advanced, have you determined
14 whether smokers in fact dose for tar; that is, what
15 they're smoking for is tar?

16 A. What do you mean, "as science has advanced?"

17 Q. Well have you kept abreast --

18 Have you taken a look at the science of whether
19 people who smoke cigarettes are smoking for tar as
20 well as nicotine on a dose basis?

21 A. Well what your internal documents say is that
22 tar provides essentially the flavor components for
23 the cigarette, and this is why, as the tar was
24 dropping in the '70s and '80s, you were faced with
25 having to create these witch's brews of additive

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1 packages that you put on to the tobacco which then
2 you incinerate and create thousands of more
3 unidentified compounds that go into these people's
4 bodies. That's what the tar was for.

5 MR. BLEAKLEY: Your Honor, move to strike
6 the editorial comment.

7 THE COURT: It is a little editorializing,
8 but I'll let it stand.

9 Q. Are you familiar with the studies that have been
10 done, Dr. Robertson, on whether people smoke for tar
11 separate and apart from nicotine? Have you looked at
12 those scientific studies?

13 A. Well let's look at them.

14 Q. I'm just asking you if you have, before you came
15 into court today to testify.

16 A. Well I haven't seen anything in your internal
17 documents that would say we're in the tar-delivery
18 business for dose -- dose ranges of tars, that's --
19 that's nonsense because tar contains ten thousand --
20 ten thousand compounds.

21 Q. Have you looked at what Dr. Hasenfratz
22 Hasenfratz has published on the subject of people
23 dosing for tar, separate and apart from nicotine?

24 MR. CIRESI: Objection.

25 A. I wouldn't --

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1 MR. CIRESI: Excuse me. Objection, asked
2 and answered in the broader form.

3 THE COURT: I'll allow the answer.

4 A. To the extent people dose for tar, if that --
5 that's a --

6 Dosing for what complement of tar? Tar is ten
7 thousand, twenty thousand, maybe a million compounds.
8 What they're -- what they're getting from the tar is
9 these complex -- the complex chemistry that gives
10 cigarettes their flavor and -- and their -- their
11 character, because you know if you just take nicotine
12 and dump it onto cellulose and light it on fire and
13 smoke it, you can't smoke it, it's an acrid, pungent,
14 bitter compound, and so you need to -- you need to
15 have taste in order to achieve your consumer
16 acceptance so that you can deliver the nicotine, the
17 business you're in, which is delivering nicotine.

18 MR. BLEAKLEY: Your Honor, could I have
19 the question -- I'm sorry. Could I have the question
20 read back about Dr. Hasenfratz Hasenfratz?

21 (Record read by the court reporter.)

22 Q. Do you know the studies or not, Dr. Robertson?

23 A. Dr. Hasenfratz Hasenfratz's studies on the dose
24 threshold of tar for the purpose of delivering tar to
25 people who make a product?

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1 Q. Yes.

2 A. Then why don't you take nicotine out of your
3 cigarettes if they're just smoking it for tar?

4 MR. BLEAKLEY: Your Honor, I'd move to
5 strike as non-responsive.

6 THE COURT: It is non-responsive.

7 Q. Have you looked at Dr. Hasenfratz Hasenfratz's

8 work?

9 A. No.

10 Q. Compensation, as you've used the term in your

11 testimony, Dr. Robertson, would mean that people who

12 are smoking low delivery cigarettes with low tar, low

13 tar and low nicotine, smoke them harder in order to

14 get what they're used to with higher delivery

15 cigarettes; correct? That's what compensation would

16 be, is smoking these more; right?

17 A. Yes, smoking the -- the device in such a

18 way as to increase the -- the nicotine delivery. Of

19 course that will also increase the tar delivery, and

20 of course when you increase the tar delivery with the

21 nicotine delivery, getting more tar is going to

22 change the taste characteristics.

23 Q. Have you looked at the studies which see how

24 people smoke high nicotine/low tar cigarettes in

25 order to see if they still compensate because they're

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1 seeking tar? Have you looked at those studies?
2 MR. CIRESI: Object to the form of the
3 question. If he has a study, it should be shown, not
4 counsel testifying.

5 MR. BLEAKLEY: I'm asking if he's familiar
6 with the literature, Your Honor.

7 MR. CIRESI: Your Honor, he's describing --
8 attempting to describe literature without putting the
9 exhibit in front of the witness.

10 THE COURT: Do you have a study that you
11 can show him?

12 MR. BLEAKLEY: There are -- there are --
13 there are a number of studies, Your Honor. I'm just
14 asking if he's even familiar with the area.

15 THE COURT: Okay. You're asking a specific
16 question, so -- I mean if you have a specific study,
17 I think it would be fair to the witness to show it to
18 him.

19 MR. BLEAKLEY: I do, but in the interests
20 of -- of -- of expedience, Your Honor, I'm just
21 asking if he's even familiar with the area of
22 research. If you want, we can pursue them study by
23 study.

24 MR. CIRESI: Your Honor --
25 MR. BLEAKLEY: I just want to know if he
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1 knows about it.
2 MR. CIRESI: And let me also object because
3 it's outside the scope. That was the subject of Dr.
4 Hurt's testimony.

THE COURT: Okay. Well doctor, I guess you can answer if you're familiar with this area.

7 THE WITNESS: I'm not familiar with the
8 studies he's referring to, and if we need to go
9 through them one by one, we'll go through one by one.
10 I am familiar with, in the high nicotine-to-tar

11 cigarette, I am familiar with the problems of the
12 irritation and the harshness that arise from them and
13 the need to mask that taste -- mask that problem.

14 Q. The concept that people smoke for a particular
15 dose of nicotine has been referred to in our
16 documents and in the literature as titration;
17 correct?

18 A. I've seen that used.

19 Q. And titration really means that people kind of
20 have a particular dose that they like, and they smoke
21 more or less to get that particular dose; correct?

22 A. That's what's said, yes.

23 Q. In point of fact, isn't it true that today, in
24 much more recent work, it's now turned out that the
25 titration theory has never been convincingly

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1 demonstrated? Are you familiar with the more recent
2 studies on titration of nicotine?

3 A. Well let's take a look at them.

4 Q. I'm asking you if you have kept up. Do you know
5 the current science today on titration of nicotine?

6 A. What I do know is what, based on the documents
7 I've reviewed, what your industry did for nearly 40
8 years with regard to tar and nicotine, and what --
9 what comes out very clearly in looking at those
10 documents is the concern, is the obsession with
11 delivering nicotine and maintaining a dose level of
12 nicotine in the face of declining tar levels, because
13 everybody in your client companies realized that as
14 the tar dropped, cigarette smoke got thin, the
15 sensory panels didn't care for it, it was losing its
16 taste, and this is why you went to these complex
17 flavor packages, why you researched new kinds of
18 casings to put on the cigarette to bring back what in
19 fact you were losing as the tar dropped.

20 Your documents don't speak to tar dosage levels,
21 they don't speak to dosing any other compound in tar,
22 the only thing they speak to is dosing nicotine and
23 using the tar and the taste attributes of tar to mask
24 the harsh, irritating flavor of nicotine. That's
25 what the documents speak to for 35 years. For 35

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1 years this is the way this industry has worked.

2 MR. BLEAKLEY: Could I have the question
3 read back, please.

4 (Record read by the court reporter.)

5 A. What studies are you referring to?

6 Q. Any current studies on the titration of
7 nicotine. Have you kept up with it?

8 MR. CIRESI: Well Your Honor, again, I'm
9 going to object to the form. He's not referring to
10 any particular document.

11 THE COURT: Sustained.

12 BY MR. BERNICK:

13 Q. Have you done a literature search, Dr.
14 Robertson, to determine what articles are out there
15 today on the science of titration?

16 A. Well I did an extensive literature search on
17 issues having to do with cigarette design, which is
18 what I'm here to testify about.

19 Q. Did you do a literature search to find out what
20 the articles say today about titration?

21 MR. CIRESI: Objection, asked and answered.

22 MR. BLEAKLEY: I had a non-responsive
23 answer the first time, Your Honor.

24 THE COURT: Counsel, please don't
25 characterize the witness's testimony.

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1 MR. BLEAKLEY: Okay.

2 THE COURT: You may answer the question.

3 A. I did. I told you what I did.

4 Q. You've talked frequently about the internal
5 documents that you've reviewed. Who did you get
6 those documents from?

7 A. I received them from the attorneys.

8 Q. I'm sorry. Who?

9 A. The attorneys.

10 Q. The attorneys for the state; correct?

11 A. Yes.

12 Q. Was it important to you, if you were going to
13 base your opinions, as you've testified, on the
14 internal documents, to make sure that you had the
15 full picture of what documents were out there and
16 whether you had reviewed documents that gave a
17 complete perspective on what the companies were
18 doing? Was that important to you?

19 A. It would be important to have a representative
20 cross-section of the documents, yes.

21 Q. Did you ever go beyond asking counsel for the
22 state just to give you documents?

23 A. What I asked for is, after I started reviewing
24 the internal documents that I was sent -- and you
25 have to realize that --

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1 I can't tell you how astonished I was at -- at
2 what I was seeing.

3 MR. BLEAKLEY: Your Honor, I move to
4 strike the editorial comment.

5 THE WITNESS: Well it speaks to what the
6 question you've asked me is.

7 MR. BLEAKLEY: Your Honor, I have that
8 motion.

9 THE COURT: All right. The witness's
10 astonishment will be struck.

11 MR. BLEAKLEY: Your Honor, could we have
12 an instruction to the witness? This has happened
13 several times now --

14 THE COURT: Counsel, do you have a question
15 to address to the witness?

16 MR. BLEAKLEY: Okay.

17 BY MR. BERNICK:

18 Q. Dr. Robertson, did you take the time to ask for
19 depositions that had been taken of people who work
20 for the companies to see what they had to say about

21 the information that was in their files that it had
22 learned? Did you do that?

23 A. Yes.

24 Q. You read depositions in this case?

25 A. Yes, I did.

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1 Q. Which depositions did you read?

2 A. I read Townsend's deposition, I read Rowell's
3 deposition.

4 Q. Who else?

5 A. Those two are the ones that come to mind, but
6 there were others.

7 Q. What about the depositions of the people who
8 wrote the documents?

9 A. Rowell is an expert, correct?

10 A. If that's what you say, yes.

11 Q. Okay. Well he didn't work for any of the
12 companies. He's an outside expert; right?

13 A. That's correct.

14 Q. Townsend worked for one of the companies; right?

15 A. That's right.

16 Q. Okay. What about the people who wrote the
17 documents that you testified about, did you read
18 their depositions?

19 A. I told you I may have read others. Those are
20 the two that come to my mind.

21 Q. Let's talk a little bit about -- well when
22 you --

23 At least with regard to the documents that
24 you've displayed to the jury, did you make sure to
25 ask for other documents that related to the same

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1 subject matter so that you could fully appreciate
2 what these documents were designed to do and what
3 happened as a result of them? Did you make follow-up
4 requests?

5 A. Yes, I did. As I came across topics, I would
6 ask for any other that might -- that they might have
7 that would speak to particular topics as -- as time
8 went on and -- and I began to understand better the
9 pieces of the puzzle.

10 Q. Okay. Let's go through a few.

11 I want to show you a chart that was displayed to
12 the jury from Exhibit 12223, which is at volume two,
13 tab 47.

14 A. Okay.

15 Q. If you look at the chart that's got the Bates
16 numbers, last four digits of which are 4419, --

17 A. Yes.

18 Q. -- did you ever ask where that chart came from?

19 A. This particular chart?

20 Q. Yes.

21 A. Well I've seen it in the literature.

22 Q. Which literature have you seen it in?

23 A. Well in Morie's article in Tobacco Science.

24 Q. Take a look at tab one -- or volume one, tab 25.

25 MR. CIRESI: Do you have a exhibit number,

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1 please?
2 MR. BLEAKLEY: Yes. GK100344.
3 MR. CIRESI: Again, please.
4 MR. BLEAKLEY: I'm sorry, GK100344.
5 Q. Is that the Morie article?
6 A. Yes.
7 Q. Is that an article that you read in connection
8 with your testimony here?
9 A. Yes. I'm familiar with the article.
10 Q. And does that article contain exactly the same
11 chart published in the -- in the published literature
12 that was contained in the BATCo chart that was shown
13 to the jury?
14 A. It appears to be the same, yes.
15 MR. BLEAKLEY: Your Honor, we offer
16 GK100344.
17 MR. CIRESI: Under 803?
18 MR. BLEAKLEY: We're offering it for two
19 purposes, one, the witness -- well actually we'll
20 offer it for one purpose. The witness relied upon it
21 in connection with his work, and we offer it to
22 establish the fact that the chart that was displayed
23 to the jury as being from an internal study was in
24 fact taken from the published literature. We offer
25 it for that fact, Your Honor.

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1 MR. CIRESI: Your Honor, can he make an
2 offer under the rules?
3 THE COURT: Okay. Make an offer under the
4 rules, please.
5 MR. BLEAKLEY: That -- that is the offer
6 under the rules. I'm not introducing it -- I -- I'm
7 not introducing it to prove the truth of the matter
8 that's reflected in the chart, I'm offering it as a
9 historical fact that this chart was published in the
10 open literature; therefore, there's no hearsay rule
11 that applies to it.
12 MR. CIRESI: It's an inappropriate offer.
13 If he's offering it under 803(18), we have no
14 objection.
15 THE COURT: I'll receive it under 803(18).

16 BY MR. BERNICK:

17 Q. The BATCo chart was taken right from the
18 published literature; correct?
19 A. I don't understand the point. I mean it's --
20 Q. Just answer it. I mean was this chart taken
21 from the published literature?
22 A. Well they appear to be the same. Whether the
23 person who wrote that copied it out of here -- he may
24 have. I mean anyone can calculate this.
25 Q. Well let's take a look at another document.

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1 Take a look at Plaintiffs' Exhibit 10110, which is at

2 tab -- volume three, tab 71.
3 MR. CIRESI: Can we have the exhibit
4 number, counsel?
5 MR. BLEAKLEY: Yes, PX10110. One of your
6 exhibits.
7 A. Okay.
8 Q. Do see at page ten of that document Lorillard,
9 too, went to the published literature and grabbed the
10 same chart from Morie?
11 A. That's true, and they appropriately referenced
12 it.
13 Q. In fact, if you take a look at the -- this was
14 the Lorillard piece -- their memo that you talked
15 about to the jury dated July of 1976 -- correct?
16 A. Yes.
17 Q. And in fact, the Lorillard document relies for
18 its information on page after page of references to
19 the published literature on the subject; true?
20 A. Well this is a -- an article dealing with pH and
21 its -- and its measurement, and it refers to the --
22 to the literature.
23 Q. Did you take the time to go through the articles
24 that Lorillard went through back in 1976 to see
25 whether what Lorillard was talking about in the

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1 internal documents was different in terms of the
2 science from what was already published in the
3 scientific literature? Did you do that?
4 A. Well I don't quite understand what your point
5 is. Because I have no problem with Leighton Chen
6 writing a -- a -- a review of pH of smoke and
7 referring to the literature.
8 Q. Okay.
9 A. I see nothing wrong with that.
10 MR. CIRESI: I'm sorry.
11 MR. BLEAKLEY: Excuse me.
12 MR. CIRESI: Can the witness finish?
13 MR. BLEAKLEY: I'm sorry. I thought you
14 were finished.
15 A. I see nothing wrong with that. And the fact
16 that nicotine is responsive to changes in pH because
17 it's a base substance is well known in the world of
18 chemistry. What's -- what's, of course, not known is
19 how your industry made use of it.
20 Q. Oh, I see.
21 A. And it made use of it secretly to manipulate
22 nicotine.
23 MR. BLEAKLEY: Yeah. Your Honor, again
24 move to strike the editorial comment.
25 THE COURT: I don't classify that as

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1 editorializing. It may stand.
2 BY MR. BERNICK:
3 Q. Well Dr. Robertson, do you know if anything that
4 is said by Lorillard concerning pH and nicotine in
5 this document is anything different than what was in
6 the open literature that's cited in the document at

7 the time? Do you know?
8 A. Well I'd have to review this to see if Mr. Chen
9 made any of his own conclusions. I don't know that
10 this -- I don't recall if this is just a true
11 literature review or whether he's making comments
12 based upon the literature and in terms of relating
13 that to cigarette. I'd have to sit here -- cigarette
14 manufacturing. I'd have to sit here and -- and read
15 it. But clearly what it demonstrates is as is -- was
16 true throughout the entire industry, there was a -- a
17 strong desire to know about and control pH of smoke,
18 and this is what this document represents. And I
19 have absolutely no problem with people in the -- in
20 the industry searching the outside literature to
21 learn what they can so that they can use those
22 concepts inside in the ways that they did.

23 MR. BLEAKLEY: Can I have the question
24 read back, please.
25

(Record read by the court reporter.)

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1 A. I gave you my answer.
2 Q. Do you know of anything that was in the
3 documents that Lorillard knew that was different from
4 what was known in the published literature?

5 MR. CIRESI: Objection, asked and answered.
6 THE COURT: It's been asked and answered.
7 MR. BLEAKLEY: I'm sorry? I'm sorry?
8 THE COURT: It's been asked and answered.

9 BY MR. BERNICK:

10 Q. Can you identify anything that was different
11 that they knew?
12 A. Well what shows in this article, if you just
13 read the last page, it says, "One final question
14 needs to be posed, whether an optimal pH can be
15 defined or targeted? In the absence of quantifiable
16 predictors for consumer preferences relative to
17 flavor and taste, a purely operational definition
18 must suffice: the optimal pH is the pH in which the
19 delivered smoke gives a perceived taste, flavor and
20 physiological impact most satisfying to the market
21 target."

22 So what he does is he reviews pH, but in the end
23 when he relates it to your industry, he relates it in
24 a way that provides us with the clue as to why he
25 wrote this in the first place. He was interested in

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1 trying to relate pH to the business, and the business
2 was altering the form of nicotine for the purpose of
3 delivering nicotine in an altered, functional form to
4 the user.

5 MR. BLEAKLEY: Move to strike as
6 non-responsive.

7 THE COURT: It is responsive to the
8 question you asked, counsel.

9 BY MR. BERNICK:

10 Q. Taking a look at Exhibit 13431, it was
11 introduced on direct examination. This was a

12 market -- "SMOKING BEHAVIOR MARKETING CONFERENCE,"
13 and you went through several pages of this. Do you
14 remember?
15 A. Yes.
16 Q. Did you ask of counsel whether there were any
17 documents which reflected where it was that BATCo got
18 the information on smoking behavior that is contained
19 in this document?

20 A. Where BATCo got this information?

21 Q. Yes.

22 A. Well there's a huge amount of information in
23 there. What information are you talking about?

24 Q. Any of the information. Did you ask where BATCo
25 got them, whether they got them from the published

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1 literature or from some other source? Did you ask?
2 A. When I read these, I assumed that -- the only
3 two things I could assume, either BATCo obtained this
4 information from their own experience in-house, they
5 either got it from looking at the literature, or they
6 got it from intelligence operations seeking to find
7 out what other -- other competitors were doing.
8 Q. And did you -- did you make any inquiry to
9 determine which one of those alternatives was
10 correct?

11 MR. CIRESI: Objection, Your Honor, it's
12 irrelevant.

13 THE COURT: You may answer that.

14 A. Well for a document this size, and going through
15 every single page and trying to understand where the
16 information came from when the information itself
17 isn't referenced by the person who put this document
18 together, that would be pretty difficult to do;
19 wouldn't it?

20 Q. Well did you ask about whether there were --
21 Are you familiar with the fact that in the same
22 year there was another conference at BATCo on
23 nicotine that was held by the scientists? Are you
24 familiar with that fact?

25 A. Oh, I may be. It doesn't ring a bell. What
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1 conference was that?

2 Q. The 1984 nicotine conference that BATCo held,
3 are you familiar with that conference?

4 A. And where was it held?

5 Q. I'm just asking if you were familiar with the
6 conference.

7 A. Well I'm just trying to ask some information
8 about it to see if I can recollect. Where was it
9 held?

10 Q. I don't remember the particular location. I'm
11 asking you where --

12 A. Well you have the same problem I do.

13 Q. I may well.

14 (Laughter.)

15 Q. How about -- how about Southampton?

16 A. Yeah, perhaps.

17 Q. All right. Do you know about the Southampton
18 nicotine conference?

19 A. Well I --

20 There's been a lot of things going on in
21 Southampton.

22 Q. Do you know about the 1984 Southampton nicotine
23 conference?

24 MR. CIRESI: Your Honor --

25 A. Well why don't you show me the record of it and
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1 I'll tell you if I've seen it.

2 MR. CIRESI: Do you have an exhibit number,
3 please?

4 MR. BLEAKLEY: TG522.

5 MR. CIRESI: TG?

6 MR. BLEAKLEY: TG.

7 MR. CIRESI: That wasn't designated,
8 counsel. It's a violation of the order, Your Honor.
9 Wasn't designated.

10 May we have a copy?

11 MR. BLEAKLEY: I believe it was
12 designated --

13 MR. CIRESI: Well do you have a copy,
14 counsel?

15 MR. BLEAKLEY: -- in our February 4th
16 letter.

17 Do you have a extra copy?

18 MR. CIRESI: Do you have a copy, counsel?

19 MR. BERNICK: We'll see if we can find an
20 extra copy. Actually, you know what, if you want to
21 take a look at volume three, tab 74, it's there. And
22 maybe you could use, counsel, the copy that I
23 furnished to the witness.

24 MR. CIRESI: It's not in your February 4th
25 letter.

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1 MR. BLEAKLEY: Take a look at the last
2 page.

3 MR. CIRESI: May I approach, Your Honor, to
4 see what the document is?

5 Okay.

6 MR. BLEAKLEY: Do you want to correct your
7 misstatement?

8 MR. CIRESI: Is it on our letter? Is it on
9 the letter?

10 That was not designated in accordance with the
11 rules. That was in one of the later of eight letters
12 that was referred where they withdrew documents and
13 put them back in, a series of eight letters for this
14 witness.

15 MR. BLEAKLEY: We provided an updated
16 letter, Your Honor. This was --

17 THE COURT: All right, counsel. Counsel,
18 do you have a copy available for the parties?

19 MR. CIRESI: Your Honor, we'll -- we'll
20 just proceed. The witness has one and we'll follow
21 along.

22 THE COURT: Do you have one, counsel?
23 MR. CIRESI: We don't.
24 Oh, now we do.
25 THE COURT: Okay. Let's go.
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1 BY MR. BERNICK:
2 Q. Dr. Robertson, have you ever seen that document
3 before?
4 A. Well I can't tell you for sure one way or the
5 other because there's -- as you might expect, I've
6 looked at thousands of documents. But it's --
7 Q. Could you check back to the end to see all the
8 references that are contained in that document.
9 A. Well here is -- here's some pages in the
10 document, for instance, that I -- that I have seen,
11 so it looks like --
12 Q. Do you see the published literature references
13 in the document?
14 A. So it looks like I have seen at least some of
15 this document.
16 What published literature are you speaking
17 about? There's nothing in the back.
18 THE COURT: Why don't we take a short
19 recess.
20 MR. BLEAKLEY: Yeah. I'm sorry, Your
21 Honor.
22 THE CLERK: Court stands in recess.
23 (Recess taken.)
24 THE CLERK: All rise. Court is again in
25 session.

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1 (Jury enters the courtroom.)
2 THE CLERK: Please be seated.
3 THE COURT: Counsel.
4 MR. BLEAKLEY: Thank you, Your Honor.
5 BY MR. BERNICK:
6 Q. Dr. Robertson, if you could turn back to volume
7 three, tab 74.
8 A. Did you want me to look at the references in
9 that --
10 Q. I'm going to go through those, yeah. That's
11 volume three, tab seventy --
12 A. Volume three, tab 74?
13 MR. CIRESI: Do you have the number of the
14 exhibit?
15 MR. BLEAKLEY: That was TG3522 -- I'm
16 sorry, TG000522.
17 Q. Are you with me?
18 A. Yes.
19 Q. If you turn to the page that ends 118 --
20 A. Are you referring to the Bates numbers?
21 Q. Yes, at the -- at the bottom -- at the
22 right-hand side of the page 118.
23 A. Okay.
24 Q. Are you familiar with Armitage's 1975 study
25 on -- on puff duration, on puff -- numbers of puff

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1 and blood nicotine levels?
2 A. I've read some of the Armitage articles. Could
3 you show me this one?
4 Q. That's really what I wanted to ask you. Did you
5 look up this particular article?
6 A. I just told you I read several, and I could
7 probably recognize it if you showed it to me.
8 Q. Well when you got this report --
9 You said you read this report, did you not, of
10 this conference?
11 A. Yes, I -- I do recognize this.
12 Q. Yeah. Did you go and look up the reference
13 that's contained in this chart, the reference that's
14 contained in the next chart, the references contained
15 in the chart after that to Armitage '75, Armitage '75
16 and Benowitz '83? Did you do that?
17 A. Well I said I've read several of the Armitage
18 papers and several of the Benowitz papers, and if we
19 look at which one this is referring to, I could tell
20 you whether I did or not.
21 Q. Well I'm just wondering whether as part of your
22 investigation of this document you took that step.
23 MR. CIRESI: Objection, asked and answered.
24 THE COURT: It's been asked and answered,
25 counsel.

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1 Q. Did you determine that there was anything that
2 had been discovered regarding the matters set forth
3 in this conference that was different from what
4 appears in the articles?
5 A. Well that's a -- a huge question. If you want
6 me to sit here and go through this conference
7 proceedings, I'll do that, but that's just too huge
8 of a question.
9 Q. Well that's -- that's -- that's a fair
10 statement.
11 Can you make a statement one way or another
12 about whether you recall finding something that had
13 been discovered in this conference that was different
14 from what appeared in the literature that was being
15 referred to? Did you --
16 A. What do you mean?
17 Q. Did you find something of consequence that was
18 different?
19 A. Than?
20 Q. Than what was already published in the
21 literature at the time.
22 A. Well I would have to go through and study this
23 large document to ascertain what issues they're
24 referring to that were brought in from the outside
25 literature and what issues that they're referring to

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1 that were brought in from their in-house research.
2 Q. And are --

3 Have you done that work as an expert and are you
4 prepared to testify to that today?

5 A. Well let's talk about an issue.

6 Q. No, I --

7 Have you done the work before you came in here
8 to court? All I'm asking you is whether you have
9 done that comparison so that you can tell the jury
10 what the result of the comparison is.

11 MR. CIRESI: Objection, unless we know
12 which specific comment. It's overbroad, over-vague.

13 THE COURT: You can answer the question.

14 A. My answer is the same. That's a huge question.
15 You'd have to do that topic by topic very
16 specifically.

17 Q. And you haven't done it yet; correct?

18 A. No. I have read the literature regarding issues
19 that are brought up and issues that are discussed
20 here, but we'd have to do it issue by issue.

21 Q. Can you identify a single issue where there is a
22 material discovery that was made by BATCo internally
23 that's not contained in the outside literature at the
24 time? Can you tell the jury that fact?

25 A. Well that's another huge, huge question. What
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1 I -- what I can tell you, however, --

2 Q. Well first --

3 A. -- is that however -- whatever was in the
4 outside literature that was pertinent to the business
5 of developing this drug-delivery system was used. I
6 mean these people were familiar with the outside
7 literature, there's no question about it. But
8 it's

9 The way a business works, as you well know, is
10 you take in knowledge from the outside and then you
11 develop internal knowledge. You don't have these
12 enormous research and development laboratories just
13 to have minions in there reading the literature and
14 deciding how to make a product.

15 Q. And I take it --

16 A. This makes no sense to me, and it's -- it's --
17 it's false.

18 Q. Can we -- can we agree, Dr. Robertson, that the
19 fact of taking ideas as they appeared in the outside
20 literature and investigating them and researching
21 them, that's exactly what you'd expect any company
22 with an R&D department to do; wouldn't you?

23 A. Everybody looks to the outside literature. But
24 I don't know of any literature in the public domain
25 that says develop a drug-delivery device to deliver

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1 dosage forms of nicotine to people, and here's how
2 you do it. That was all developed in-house.

Q. It was all developed in-house, whereas the

4 Surgeon General in 1981 says that the industry should
5 do precisely that; correct?

6 MR. CIRESI: Objection, Your Honor, it's a
7 misstatement. It's also argumentative.

8 THE COURT: Okay. It is argumentative.
9 Q. Let me put the question to you again in a
10 slightly different form. I take it you don't quarrel
11 with the idea that the industry can take ideas that
12 are developed in the outside literature or through
13 the public health authorities and investigate them
14 and research them as part of developing their
15 product. Do you take --

16 MR. CIRESI: Objection.

17 A. -- issue with the industry doing that, or any
18 industry doing that?

19 MR. CIRESI: Objection, it's been asked and
20 answered twice. Also the form.

21 THE COURT: You may answer it.

22 A. I have no problem with an industry, even the
23 cigarette industry, being reliant on a knowledge base
24 that exists outside the industry, and in fact it
25 would be silly to imagine otherwise. It's what you

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1 do with that knowledge, it's -- it's how you take
2 that knowledge and weave it into a new kind of
3 fabric, in this case a consciously-designed
4 drug-delivery device, and that's the output of the
5 industry.

6 Q. And the output of the industry and the design of
7 the product is what we talked about yesterday;
8 correct?

9 A. What are you referring to?

10 Q. Well all I'm saying is that what finally comes
11 out --

12 There may be lots of ideas that get developed
13 from the outside, brought in-house, that just don't
14 turn to work out; correct?

15 A. Oh, that's common in -- in R&D, that you attempt
16 things that -- we have discussed that, whether
17 they --

18 They may or not work out, it depends on the
19 utility to the business at hand, or you may keep
20 things on the shelf for a while and use them at some
21 later date.

22 Q. And under any of those circumstances, whether
23 the idea is worked out or not, we would still find
24 documentation in the companies' files that discuss
25 those ideas; correct?

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1 A. I would expect that they keep appropriate
2 records, that you'd find instances where they
3 attempted a project and it -- and it didn't work out,
4 and other times you'd find the trail that leads to a
5 successful product within the files of the company.

6 Q. Last question to you: The additives, isn't it a
7 fact that a list of these additives was provided to
8 the federal government in 1984 so the federal
9 government could look into whether they were
10 appropriate additives for cigarettes?

11 A. Well as I recall, I thought that the companies
12 gave these to a law firm and then they were given --

13 so they went to a law firm, as I understand it, and
14 then -- I don't know what happened there, and then it
15 was given to the HHS.

16 Q. And -- and do you know whether the list that was
17 given to HHS was comprehensive, of literally hundreds
18 of additives that are used in cigarettes?

19 A. Comprehensive? You mean did they tell
20 everything that they knew?

21 Q. Do you know of any additives that were not
22 disclosed to HHS?

23 A. Well how would I know that?

24 Q. I'm just asking. I'm not -- I don't think that
25 you would, but I'm just asking you.

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1 Are there any of these additives that haven't
2 been disclosed to HHS?

3 A. No, those have been disclosed.

4 Q. Yeah.

5 A. I don't know if there's any additives that
6 haven't been disclosed.

7 Q. Okay. And isn't it a fact that HHS was to
8 determine if there was a problem with including those
9 additives in cigarettes?

10 A. I don't know what HHS was to do with that
11 information.

12 Q. Isn't it a fact that HHS since 1984 has never
13 taken a position that any of those additives is
14 inappropriate for use in cigarettes?

15 MR. CIRESI: Objection to the form of the
16 question, Your Honor. Counsel is testifying.

17 THE COURT: You may answer if you know.

18 A. I didn't --

19 As I said, I don't know what HHS does with that
20 information. I don't know if they pyrolyze these and
21 they look at the adverse-reaction components that
22 could result when you incinerate them as you do in a
23 cigarette. I have no idea of what they do with that
24 information.

25 Q. Isn't it also a fact that additives and their
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1 potential consequences for risk were also
2 investigated by the Tobacco Working Group with the
3 National Cancer Institute?

4 A. What I do recall is, in the internal documents,
5 is a -- a concern that they better start being more
6 careful about and more vigilant about the additives
7 they put in cigarettes in terms of the adverse
8 consequences that might result from them. I do
9 remember those documents.

10 Q. Can we focus on the question though? Isn't it a
11 fact that additives and their potential effect on
12 risk in cigarettes was specifically investigated by
13 the National Cancer Institute as part of the Tobacco
14 Working Group?

15 A. Which of these additives?

16 Q. Have you looked into it at all?

17 A. Well I'm just asking which of these additives.

18 Q. Well cocoa.
19 A. Well that's one out of about 700.
20 Q. Well could you begin with that one. Do you know
21 whether the National -- the National Cancer Institute
22 and the Tobacco Working Group looked into the
23 appropriateness of using cocoa as an additive?
24 A. Well show me some documents that show me what
25 they did and I'll tell you.

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1 Q. Well I'm really asking for what you know. Do
2 you know whether they looked at it or not?
3 A. Specifically I don't know what they did with
4 additives. If you'd show me the documents that deal
5 with it, summary proceedings or what have you, I
6 could answer that.
7 Q. Do you know whether additives were discussed in
8 the Banbury conference on safer cigarettes with the
9 outside scientists?
10 A. It may have. I don't recall.
11 Q. Do you know whether --
12 Are you familiar with the Hunter Committee in
13 England?
14 A. Yes, I have heard of the Hunter Committee.
15 Q. Do you know whether the additives were -- there
16 was a published list of approved additives that came
17 out of the ISC process in England?
18 A. The Independent Scientific Committee --
19 Q. Yeah.
20 A. -- in England?
21 I do know that the -- the Hunter Commission was
22 concerned about additives, but I don't know how these
23 additives were approved, I don't know how they were
24 tested, and I don't know how that testing related to
25 what happens in a cigarette when you incinerate them.

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1 Q. Well I'm just --
2 Maybe I'll put the question to you and tell me
3 what the answer is: Have you looked to see if there
4 is an approved list of additives that came out of the
5 ISC committee?
6 MR. CIRESI: Objection, it's outside the
7 scope of discovery.
8 THE COURT: No, you can answer it if you
9 know.
10 A. I don't know one way or the other what list they
11 approved, if they approved a list.
12 Q. Okay. Do you know how long additives have been
13 used in tobacco?
14 A. Heaven knows what people might have put on
15 tobacco in the -- in the early days. I mean it's --
16 I do know that in modern cigarettes additive
17 packages are very, very important.
18 Q. Do you know how long additives have been used in
19 tobacco?
20 A. I can't tell you the first day they started
21 adding it. I presume it's been -- been used for some
22 long period of time.

23 Q. Back to the Portugese sailors that used to
24 sprinkle licorice on their tobacco to preserve it?
25 MR. CIRESI: Well, Your Honor, I'm going to
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1 object to counsel's form of the question.
2 THE COURT: Counsel, you are testifying.
3 Q. Do you know the history of the early use of
4 additives as a flavorant?
5 A. As I told you, my work was focused primarily on
6 the documents that were provided. I wasn't studying
7 Portugese history.
8 Q. Were you studying tobacco history at all?
9 A. I was studying the internal documents from the
10 time that the first internal documents that I had
11 were dated and moving forward. And there was
12 ancillary -- ancillary information about material in
13 the past having to do with the tobacco companies and
14 the invention of the cigarette-making machines and so
15 forth, but I didn't focus on that. I focused on what
16 it was you people, your clients knew and what it is
17 they did with the information they knew about in
18 terms of making this drug-delivery system. That's --
19 that's what I'm here to testify about.
20 Q. And you're not here to testify about any
21 particular health risks associated with additives
22 because that's outside of your expertise; correct?
23 MR. CIRESI: Your Honor, that's been asked
24 and answered three times.
25 THE COURT: It's been asked and answered.

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1 Q. Combustion products. You showed this table here
2 as a part of Exhibit 11973.
3 A. Yes.
4 Q. Did you look to see what the Surgeon General
5 reports have discussed concerning combustion products
6 going back to 1964?
7 A. I don't have a recollection of what -- of what
8 they said, but if you can show me what they said, we
9 can discuss it.
10 Q. Well I guess what I'm asking you is: Did you
11 look to see if there are any combustion products that
12 were identified, for example, in this document by
13 BATCo? Were there any combustion products that
14 weren't publicly available through the Surgeon
15 General's reports?
16 A. I don't know of anybody who knows all the
17 combustion products that are found in tobacco,
18 Surgeon General or your clients.
19 Q. But you certainly have not made a comparison
20 between what's contained in -- in internal documents
21 about combustion products and what's published in the
22 literature; have you?
23 MR. CIRESI: Objection, Your Honor, it's
24 outside the scope.
25 MR. BLEAKLEY: I'm asking if he's made the
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1 comparison.

2 MR. CIRESI: Your Honor, whether he has or
3 hasn't is outside the scope. He's not here on the
4 health effects of smoking.

5 THE COURT: Okay. You may answer the
6 question.

7 A. I've seen lists of chemicals that are in the
8 open literature and I have seen lists of chemicals
9 that have been present in the internal documents. I
10 haven't made a side-by-side comparison. The list is,
11 as you well know, is -- is enormous.

12 Q. It's huge, yes.

13 A. And it's incomplete.

14 MR. BERNICK: I'd like to mark a couple of
15 these charts for demonstrative purposes.

16 MR. CIRESI: Excuse me.

17 MR. BLEAKLEY: I'll mark as --

18 MR. CIRESI: We're glad to offer counsel
19 our exhibit stickers, but they've been designated so
20 many for the plaintiff and so many for the defendant.
21 So please, go ahead.

22 MR. BLEAKLEY: Oh, is that all right?

23 MR. CIRESI: Sure.

24 MR. BLEAKLEY: Could I borrow maybe like
25 five? Is that --

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1 Can I mark them in sequence?

2 THE COURT: Are you going to let him have
3 five, counsel?

4 MR. CIRESI: I think I will, Your Honor.

5 THE COURT: All right.

6 MR. BLEAKLEY: I'll even say please and
7 thank you.

8 We'll mark as 25015 the recipe chart, 25016 the
9 pH chart and ammonia chart, 25017 as the pH and blood
10 chart, 25018 as the ammonia and sugar chart, 25019 as
11 the peripheral and CNS effects. Can I have one more?

12 MR. CIRESI: You're beyond five already,
13 counsel.

14 MR. BLEAKLEY: Yeah, I think it's five.

15 But can I have one more? 25 -- 25020 is the
16 drug-delivery device chart.

17 And we would offer them all as demonstrative
18 exhibits for illustrative purposes only.

19 MR. CIRESI: We object to them because all
20 they are all drawings from counsel. They're not a
21 demonstrative that was written or drawn by a witness,
22 it's counsel writing down what he wants to write down
23 from testimony.

24 THE COURT: Sustained.

25 MR. BLEAKLEY: Well Your Honor, the jury
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1 can determine the weight to give, but they were used
2 for purposes of cross-examination.

3 THE COURT: Counsel, these are your

4 writings and they're not properly a demonstrative
5 exhibit.

6 MR. BLEAKLEY: Fine.

7 I have no further questions. Thank you.

8 THE WITNESS: You're welcome.

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1 REDIRECT EXAMINATION

2 BY MR. CIRESI:

3 Q. Doctor, you were asked some questions about HHS.
4 Do you recall that?

5 A. Yes.

6 Q. Do you know if information provided to the
7 Secretary of HHS by the tobacco companies is required
8 to be treated as trade secret or confidential
9 information?

10 A. I believe it is.

11 Q. And do you know if HHS was provided additives
12 with respect to those added to the paper or filter?

13 A. They were not given that kind of information.

14 Q. Can you direct your attention, please, to the
15 exhibit in front of you, which counsel gave to you,
16 TJ000522.

17 A. He took it away.

18 MR. BLEAKLEY: It's in the notebook. I
19 believe it's in the notebook.

20 THE WITNESS: Well he asked me for the one
21 you gave me, and he took it away.

22 MR. CIRESI: Do you have that exhibit?

23 MR. BLEAKLEY: Sure.

24 (Document handed to the witness.)

25 BY MR. CIRESI:

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1 Q. I believe Mr. Bernick asked you to check at
2 the back to see the list of all the references,
3 external references. Is there any such list at the
4 back of that document?

5 A. No, there's no list of references that I can
6 find in this document.

7 Q. Now if you go through that document --

8 This is one that you did review on occasion?

9 A. Yes, I found pages in here that re -- refreshed
10 my memory, so I have looked at this.

11 Q. Can you -- I'm just going to touch on a couple.
12 Can you go to page 347, last three Bates
13 numbers.

14 A. Okay.

15 Q. And title of that page is "PHARMACOKINETICS OF
16 NICOTINE." Correct?

17 A. That's right.

18 MR. BLEAKLEY: I didn't offer that.

19 MR. CIRESI: You didn't offer this?

20 MR. BLEAKLEY: No. If you'd like to put
21 it into evidence, it's fine with me.

22 MR. CIRESI: We would offer Exhibit 5222,
23 TG5222.

24 MR. BLEAKLEY: No objection.

25 THE COURT: Is that the correct number,
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1 counsel?

2 MR. CIRESI: Five --

3 THE COURT: The TG000522?

4 MR. CIRESI: I'm sorry, Your Honor. Yeah,
5 I should give you the zeroes, TG000522.

6 THE COURT: Okay. And there's no
7 objection?

8 MR. BLEAKLEY: No, Your Honor.

9 THE COURT: All right. We'll receive that
10 in evidence.

11 BY MR. CIRESI:

12 Q. I'm taking you to page Bates number 347.

13 A. Yes.

14 Q. And that's the "PHARMACOKINETICS OF NICOTINE;"
15 is that correct?

16 A. "PHARMACOKINETICS OF NICOTINE," yes.

17 Q. And in the second paragraph there, is there a
18 reference to internal research done by B.A.T?

19 A. Yes, that's right. They're talking about
20 preliminary results from a GR&D study, which is the
21 in-house research arm, that was carried out at a
22 local hospital. They were working on the
23 administration of nicotine by different routes and at
24 different rates in an attempt to recognize the
25 importance of these factors which will alter the

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1 pharmacokinetics in determining the physiological
2 effects of the drug. So I presume that they were
3 collaborating in some way in -- at a hospital in
4 human studies having to do with the fate of nicotine
5 in the human body.

6 Q. And can you direct your attention to the page
7 which bears the later three Bates numbers 356.

8 A. All right.

9 Q. Do you see the Bates number in the lower
10 right-hand corner? And does this page, which is
11 entitled "SECTION IV, SUMMARY," refer to other
12 in-house studies conducted by BATCo?

13 A. Yes. This refers to in-house studies which are

14 attempting to characterize the nature of the nicotine
15 receptor in brain tissue. These studies also provide
16 the opportunity to characterize the, quote,
17 pharmacological potential of nicotine analogs, that
18 would be other drugs that behave like nicotine, in
19 terms of their binding characteristics with the
20 nicotine receptor. So this would refer to work that
21 is being conducted within the company under their
22 auspices and within the confines of their own
23 business.

24 Q. And doctor, were there other references within
25 this document, TG000522, to internal research

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1 conducted by B.A.T based on its own internal
2 information and on outside information?

3 A. Yes.

4 Q. Mr. Bernick asked you about the Morie article,
5 which was one that you had read. Do you recall that?

6 A. Yes.

7 Q. And he also referenced you to Trial Exhibit
8 12223.

9 A. Where can I find that? Is it in the trial
10 notebook?

11 Q. It should have been on the ones that he gave
12 you.

13 A. All right.

14 Q. But if not, we can --

15 We'll put it up on the overhead here, doctor, if
16 you can follow it on that.

17 Do you recall this chart?

18 A. Yes.

19 Q. Do you recall questions where he was asking
20 whether this chart was published in external
21 literature?

22 MR. BLEAKLEY: Objection, that's not the
23 question that was put.

24 A. I -- I think the question was whether or not
25 this chart had been taken from the external

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1 literature.

2 THE COURT: Okay.

3 A. And --

4 Q. And the date of Exhibit 12223 is June of 1988;
5 is that correct?

6 A. Yes.

7 Q. Okay. And the Morie article was in 1972?

8 A. It was an early article. This whole notion of
9 the -- of the deprotonation/protonation curves is --
10 there's nothing magic or secret about that. It's not
11 unusual, probably, to find it in -- in many spots in
12 the literature, nor would I consider it unusual to
13 have the BATCo science -- science folks or anyone
14 else make use of that. I mean with a handheld
15 calculator I could calculate those same curves in
16 five minutes. So there's -- there's nothing that's
17 magic about -- about that in my opinion.

18 Q. And was that same chart referenced in other

19 documents that you saw?
20 A. Yeah. It -- it forms the basis or the -- the
21 initial basis for understanding under what conditions
22 you will have certain amount of free base, certain
23 amount of protonated nicotine. And so, obviously,
24 you're going to find that in all the documents of any
25 company that's interested in changing the functional

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1 form of nicotine through pH control. You need to
2 know that. They all knew it. They all used it.
3 Q. Now doctor, directing your attention to the
4 issue of the Benowitz article which was published in
5 the New England Journal of Medicine, Volume 331, in
6 July of 1994, do you recall Mr. Bernick directed
7 your attention to that article?

8 A. Yes, he did.

9 Q. And you stated that you had read it; correct?

10 A. That's right.

11 MR. CIRESI: May I approach, Your Honor?
12 (Document handed to the witness.)

13 Q. Do you recall Mr. Bernick asking you questions
14 regarding that article with respect to dose threshold
15 levels?

16 MR. BLEAKLEY: Your Honor, I object to the
17 form of the question. That wasn't the nature of the
18 question that was put to the witness.

19 THE COURT: Okay. Rephrase the question,
20 counsel.

21 Q. Do you recall Mr. Bernick asking you questions
22 concerning this article with regard to threshold
23 levels of nicotine?

24 MR. BLEAKLEY: Again, that's not the
25 question that was put, but let's just go ahead.

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1 THE COURT: Let's go ahead.

2 A. I remember there were questions about this
3 article.

4 Q. Can you direct your attention to page 123.

5 A. All right.

6 Q. And in the first column toward the bottom,
7 carrying over to the second column under the title
8 "ESTABLISHING A NICOTINE THRESHOLD FOR ADDICTION,"
9 does Dr. Benowitz address that issue?

10 A. Yes, he does.

11 Q. We'll start at the bottom of column number one.
12 "That nicotine addiction sustains tobacco use for
13 most smokers is well established. Once a person is
14 addicted to nicotine, quitting smoking is difficult,
15 and more than 90 percent of the smokers who try to
16 quit each year fail. An important, if not the most
17 important, component of a policy to reduce tobacco
18 use in the population is to prevent the development
19 of nicotine addiction in young people."

20 THE COURT: Counsel, excuse me.

21 MR. BLEAKLEY: Your Honor, this -- they
22 objected to our showing this very document through
23 this witness, even though it was in evidence, on the

24 grounds of lack of foundation through this witness,
25 and now they're displaying the same document. I'm
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1 happy for that, but then I want to be able to
2 question the witness as well in terms of the text of
3 this document because I was not permitted to do so
4 yesterday.

5 MR. CIRESI: He did ask a question
6 concerning this, implying the public health
7 community -- and he has said this on more than one
8 occasion -- was advocating a threshold level for
9 nicotine to keep people addicted, Your Honor.

10 THE COURT: Counsel, that --

11 MR. BLEAKLEY: Your Honor --

12 THE COURT: Just a moment, please. That
13 opens the whole document up, counsel.

14 MR. CIRESI: Well I understand. He can
15 come back on this document.

16 THE COURT: Okay.

17 MR. CIRESI: I'm just -- I'm looking at
18 the --

19 MR. BLEAKLEY: Thank you, Your Honor.
20 BY MR. CIRESI:

21 Q. "An important, if not the most important,
22 component of a policy to reduce tobacco use in the
23 population is to prevent the development of nicotine
24 addiction in young people. Young people do not start
25 to smoke because they are addicted, but rather

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1 because of psychosocial and environmental influences,
2 particularly peer influences, psychological factors
3 and advertising. Young people generally
4 underestimate the addictiveness of nicotine, and most
5 of them at first intend to smoke only a few years.
6 However, once they begin to smoke, many become
7 addicted to nicotine, and this addiction sustains the
8 self-injurious behavior into adulthood. The result
9 of nicotine addiction is a 40 percent probability of
10 premature death from illness caused by tobacco. It
11 is difficult to prevent adolescents from
12 experimenting with cigarettes. However, by
13 regulating the availability of nicotine in the
14 tobacco products, it may be possible to prevent the
15 transition from experimental or occasional smoking to
16 addiction. This paper examines the proposition that
17 the level of nicotine likely to produce addiction can
18 be estimated and that mandating a nicotine level
19 below that level is a feasible approach to tobacco
20 regulation."

21 Now doctor, with respect to your review of the
22 defendants' documents, what if any action did they
23 undertake, based on those documents, over the 30
24 years that the documents represent with respect to
25 establishing nicotine levels either below or above or

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1 at a certain level?
2 A. Well as we saw, the documents speak with great
3 clarity to their activities in this area; that is,
4 the recognition that there is a lower threshold dose
5 below which the desired pharmacologic activity
6 disappears, and in view of that, the extreme
7 necessity for this business as we know it today to
8 survive requires that the nicotine availability in a
9 cigarette, by however it's manipulated, be above this
10 threshold dose, but they made no efforts to consider
11 going below it. And when they did, as they did in a
12 few denicotinized products, no one bought them, no
13 one wanted them.

14 Q. Did you find anything in the defendants'
15 documents which reflected their desire or intention
16 or interest in working with public health authorities
17 to reduce the threshold level of nicotine below an
18 addictive level?

19 MR. BLEAKLEY: Your Honor, they have
20 consistently, consistently objected to my pursuing
21 questions and interrogation concerning our
22 relationship with public health authorities. We
23 would love to pursue the subject of public health
24 authorities, we've been consistently foreclosed from
25 doing it, and now that's exactly the subject matter

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1 he's pursuing.

2 MR. CIRESI: Your Honor --

3 THE COURT: Do you have a objection,
4 counsel?

5 MR. BLEAKLEY: Yes, my objection is that
6 it goes beyond the scope of all the prior
7 examination.

8 THE COURT: Sustained.

9 MR. BLEAKLEY: Thank you.

10 BY MR. CIRESI:

11 Q. Did you see anything in the documents with
12 regard to designing dose levels that would indicate
13 the defendants wanted to go below a certain level
14 that may be addictive? Whether it's addictive or
15 not, was that a design consideration reflected in
16 their documents?

17 A. To go below a threshold level?

18 Q. Yes.

19 A. No. Never.

20 Q. Did you find anything in the defendants'
21 documents anywhere in which they endorsed such a
22 position from a design standpoint, regardless of
23 whether it's addictive or not?

24 MR. BLEAKLEY: Your Honor, same objection.
25 Endorsed whose position?

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1 THE COURT: Rephrase that question,
2 counsel.

3 BY MR. CIRESI:

4 Q. Did you find anything in the defendants'

5 documents, regardless of whether nicotine is
6 addictive or not, which endorsed a public health
7 position of going below a presumed addictive level of
8 nicotine?

9 A. No. Never.

10 Q. Now you're not here to testify whether it's
11 addictive or not; are you, doctor?

12 A. I'm not here to testify to that.

13 Q. Can you turn to page 125 of this article. Go
14 right to the end where it reads as follows: "The
15 measures described in this proposal may seem drastic
16 to some. However, the problem of one-quarter of a
17 billion premature deaths caused by tobacco use in
18 developed countries calls for drastic action.

19 Tobacco use is motivated by nicotine addiction. We
20 offer a strategy for the prevention of nicotine
21 addiction based on recent scientific data. This
22 approach deserves study by the regulatory
23 authorities."

24 Now with regard, again, to the design of the
25 cigarette and only the design, doctor, what did the

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1 documents reflect with respect to their internal
2 knowledge as to when the defendants started
3 manipulating nicotine?

4 A. It goes to the beginning, it goes to the
5 beginning of the documents I saw. The road to
6 nicotine manipulation was there and it's been there;
7 they're all still on that road.

8 Q. Now doctor, did your review of the documents
9 indicate what the defendants said publicly about
10 whether they manipulated or didn't manipulate
11 nicotine?

12 A. Yes, I saw such documents.

13 MR. BLEAKLEY: Your Honor, again I was
14 foreclosed from pursuing this line. We would have
15 produced evidence concerning numerous public
16 statements through the literature. I was foreclosed
17 from doing it.

18 THE COURT: Do you have an objection,
19 counsel?

20 MR. BLEAKLEY: Yes. It goes beyond the
21 scope of any prior examination.

22 THE COURT: Sustained.

23 BY MR. CIRESI:

24 Q. Doctor, let me direct your attention to another
25 issue. Do you have Exhibit 13155 in front of you?

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1 A. I have it.

2 Q. And that's the article by Dr. Teague which Mr.
3 Bernick questioned you about?

4 A. Yes, it is.

5 Q. And he was asking you about market shares. Do
6 you recall, with relationship to pH?

7 A. Yes.

8 Q. Can you direct your attention on that page -- or
9 on that document, 13155, to page 4141.

10 A. Okay.
11 Q. That's an August 10th, 1973 letter from Mr.
12 Moore of the marketing research department?
13 A. That's right.
14 Q. And it's addressed to Mr. Blevins?
15 A. That's right.
16 Q. And the title of the page is "CORRELATION OF pH
17 AND SHARE OF MARKET PERFORMANCE?"
18 A. Right.
19 Q. And it's dated, as I said, August 10th, 1973;
20 correct?
21 A. That's correct.
22 Q. What's being reported here with regard to
23 correlation of pH and share of market performance in
24 their document some 20 -- 25 years before this
25 lawsuit began?

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1 A. Based on the data that they had examined
2 relating pH to share of market for commercial
3 cigarettes, including Salem, Kool, Winston and
4 Marlboro, what they found is that over the period of
5 time they made this examination there was an
6 extraordinarily high correlation between pH and share
7 of market, and in particular between free base
8 nicotine and share of market.
9 Q. And in the same document that Mr. Bernick
10 used, Exhibit 13155, can you turn to the next page,
11 page 4142, which is dated July 3rd, 1973, and was
12 again from Mr. Moore to Mr. Blevins, and it's
13 titled "CORRELATION OF SMOKE BALANCE FACTORS WITH
14 SHARE OF MARKET, SOM TRENDS."

15 A. Yes.
16 Q. And can you tell us what is reported on this
17 page of this document, 13155?
18 A. Yes. They were trying -- they were analyzing
19 the difference between -- trying to understand the
20 difference in the share of market between Winston and
21 Marlboro and between Salem and Kool, and they were
22 trying to find out what of the many variables that
23 might influence the share of market were the most
24 important, and the factors that they were including
25 were free nicotine, total nicotine, tar, nitrogen,

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1 ammonia and sugar, and they were examining these
2 variables to see which of them, if any, correlated
3 best with share of market, and so they made this --
4 they made this examination. And at the bottom they
5 point out that "In spite of confounding effects, a
6 regression model including differences in free
7 nicotine, advertising expenditures and share of
8 market of the 100's," which is a longer-length brand,
9 "with difference in share of market as the dependent
10 variable" -- so what they did is they tested to see
11 if free nicotine or whether advertising expenditures
12 or whether, as I understand it, loss of some of the
13 85 market to the 100 market were affecting the share
14 of market that the 85s had. They say that

15 relationship was explained and -- and they say "The
16 variable resulted in 97 percent of the variability
17 explained in the case of Winston 85s and Marlboro 85
18 and 95 percent of the variability explained in the
19 case of Salem 85 and Kool 85. In both cases free
20 nicotine contributed significantly to the model over
21 and above the other factors."

22 And so out of this analysis came the conclusion
23 that the distinguishing characteristic between
24 cigarettes that were gaining in the marketplace
25 versus cigarettes that were not was the free base

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1 nicotine that was being delivered to the consumer.

2 Q. Now doctor, when did American Tobacco Company
3 begin ammoniation, approximately?

4 A. 1967.

5 Q. Do you know when they stopped?

6 A. They stopped ammoniating their -- their
7 reconstituted material in the early '70s, but they
8 still did maintain some diammonium phosphate in their
9 casing through the '70s, and then they picked up
10 later with ammoniation in the recon late in the '80s
11 sometime.

12 Q. And where does American Tobacco sit in terms of
13 share of market, relatively speaking?

14 A. Near the bottom.

15 Q. And with regard to Liggett, did Liggett ever use
16 ammoniation?

17 A. Only just very recently.

18 Q. Okay. And where is Liggett's position in the --
19 in terms of share of market?

20 A. I think they may be at the bottom.

21 Q. Now I want to deal with the four remaining
22 manufacturers.

23 Philip Morris. What's its rank, share of
24 market?

25 A. Number one.

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1 Q. Who was the first company to start ammoniating,
2 of the -- of these four remaining?

3 A. Philip Morris was the first to start ammoniating
4 in 1965.

5 Q. What company was the next to ammoniate?

6 A. R. J. Reynolds.

7 Q. What's their share of the market?

8 A. They're number two.

9 Q. What was the next company which started
10 ammoniating?

11 A. Brown & Williamson.

12 Q. What's its share of the market? Where do they
13 stand?

14 A. Number three.

15 Q. And finally Lorillard, when did it start
16 ammoniating with respect to those four?

17 A. In the late '80s.

18 Q. Were they the fourth one?

19 A. They're number four.

20 Q. And with regard to those four, where do they
21 stand in terms of share of market?
22 A. Lorillard?
23 Q. Yes.
24 A. They're fourth in line.
25 Q. Direct your attention to the series of questions

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1 Mr. Bernick asked you with regard to whether you --
2 if you add ammonia, all other things being equal, and
3 then if you change the crop, all other things being
4 equal, and he took one discrete parameter of
5 cigarette design at a time and then excluded
6 everything else. Is that the way cigarettes are
7 made?

8 A. No.

9 Q. Does that bear any relationship to how the
10 formulas are arrived at by these defendants, based on
11 your review of the documents?

12 A. No. It's -- that was just very simplistic.
13 It's much more complicated than that.

14 Q. Do you recall some questions about Mr.
15 Dunn -- and I believe your attention was directed to
16 the exhibit which related to the visit to the island
17 of San Martin, north -- north or east of the
18 Antilles. Do you recall that?

19 A. I recall that.

20 Q. Something about caffeine and alcohol that was
21 written there?

22 A. Yes. He was making a comparison.

23 Q. Can you direct your attention to Exhibit No.
24 10539, which would be in volume one of the two
25 plaintiffs' volumes in front of you. This is an

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1 admitted document. Little hard to make out, but
2 we'll bring it in.

3 And this is a document to Dr. Wakeham from W. L.
4 Dunn, Jr., "Jett's Money Offer." Do you recall we
5 talked about that on direct?

6 A. Yes, I do.

7 Q. That's Jett Lincoln. He was the chief financial
8 officer of Philip Morris at the time.

9 A. That's correct.

10 Q. Now with regard to --

11 I think, and I'm paraphrasing, but Mr. Bernick
12 said something about what the employees thought,
13 their feelings or opinions, did you ask them
14 anything. What did Mr. Dunn say in terms of using
15 the pharmitc-medical model in this document, Exhibit
16 10539?

17 MR. BLEAKLEY: Your Honor, the question
18 that was put to the witness pertained to his review
19 of what people had said under oath in this case.

20 MR. CIRESI: Well was counsel implying that
21 they were not speaking the truth when they wrote
22 internal documents?

23 THE COURT: Is there an objection there,
24 counsel?

MR. BLEAKLEY: Yes. The objection is that
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1 the question mischaracterizes the nature of the issue
2 that was put to the witness on cross-examination.

3 THE COURT: Rephrase the question.

4 MR. CIRESI: I'll rephrase it.

5 BY MR. CIRESI:

6 Q. You were asked whether -- when they were under
7 oath, what they said, and did you check to see what
8 they said about various documents when they were
9 under oath. Do you recall questions to that extent?

10 A. Yes.

11 Q. Okay. Now I just want you to assume for the
12 purpose of this question that when Mr. Dunn wrote
13 documents to his superior, he didn't lie. Okay? Can
14 you assume that?

15 A. Well I -- I would -- I think that's a very
16 reasonable assumption to make.

17 Q. That he wanted to tell the truth because he was
18 imparting knowledge from himself to his superior.
19 Can you assume that?

20 A. That's -- that's easy.

21 Q. Okay. Now having those assumptions in mind, in
22 1969, before there was a lawsuit, what did Mr. Dunn
23 say with regard to using the pharmic-medical model
24 publicly?

25 A. He says, "I would be more cautious in using the
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1 pharmic-medical model: do we really want to tout
2 cigarette smoke as a drug?" Obviously, this model
3 had implications that it was indeed a drug. "It is,
4 of course, but there are dangerous FDA implications
5 to having such conceptualization go beyond these
6 walls."

7 Q. Now --

8 THE COURT: Counsel.

9 MR. BLEAKLEY: Excuse me. Your Honor,
10 once again, this pursues the issue of what was said
11 publicly in the literature. I would love to go into
12 that issue, been foreclosed from doing it so far, but
13 I believe that counsel has now opened the door. So I
14 object to this on the grounds of the scope of the
15 examination that's been permitted, but I want to
16 alert the court to the fact that I think we're
17 walking right through the door.

18 MR. CIRESI: It does not -- this --

19 THE COURT: I'm not sure --

20 I think this is just in response to the one
21 question. I don't think this quite opens the door.

22 But I believe you better be cautious --

23 MR. CIRESI: I understand.

24 THE COURT: -- if you don't want the door
25 opened.

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1 MR. CIRESI: I understand.
2 BY MR. CIRESI:
3 Q. Now this document, as we said, was written in
4 1969; correct?
5 A. That's right. It's February of 1969.
6 Q. Now let me direct your attention to another area
7 that Mr. Bernick raised. You recall he was asking
8 you about the Henderson Haselbach equation and what
9 was the amount of free nicotine within the particle
10 of cigarette smoke. Do you recall that line of
11 questioning?
12 A. Yes. He had drawn a figure on the board and was
13 asking me questions about the amount of free base
14 that would be formed at -- at different pH's.
15 Q. And he was asking you questions regarding the
16 individual smoker's perception. Do you recall that?
17 A. Yes, I do.
18 Q. Okay. Now you're not here to testify on
19 addiction; are you, sir?
20 A. No.
21 Q. You're not a medical doctor.
22 A. No, I'm not.
23 Q. Okay. Now I just want to deal with the
24 chemistry and what you're here to testify on.
25 Did you find in the defendants' files references
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1 to the speed with which free base nicotine would get
2 into the blood system of a smoker?
3 A. Yes. That was clearly understood by the
4 defendants, that the free base form of nicotine was
5 advantageous to the rate of uptake of that drug by
6 the body.
7 Q. Now having in mind your testimony that free base
8 can refer both to the particle itself and to the
9 vapor phase, --
10 A. Yes. It can only exist as free base in the
11 vapor phase.
12 Q. -- what relevance, if any, does the Henderson
13 Haselbach equation have with regard to the free
14 nicotine which is not in the particles but in the
15 vapor phase?
16 A. It only tells you the relative fraction of free
17 base that's in the particle, but it does not tell you
18 the relative fraction of free base, the total
19 nicotine in the system, and so you can't use it
20 directly to ascertain what the free base
21 concentration or amount is in the vapor phase. It
22 only tells you how much has transformed to free base
23 in the little liquid droplet. So --
24 And as we saw, at pH's around six, for instance,
25 it's only what appears to be a small amount, maybe
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1 one -- one percent in the droplet is free base, but
2 that doesn't tell you what's in the vapor, and it's
3 what's in the vapor that is controlling the
4 concentration at the wall of the alveoli which is
5 setting the rate of nicotine transfer into the blood.

6 Q. And doctor, were there documents of the
7 defendants which addressed this very issue?
8 A. Yes. There are documents in the defendants --
9 from the defendants in which free base was actually
10 measured. And this is what's key: not calculated,
11 but measured. And what you see when you look at
12 those documents is that even at a pH as low as 4.8
13 where the fractional conversion in the liquid to free
14 base is tenths or hundredths of a percent, which
15 would seem to be just deminimus, the free base in
16 that system -- the amount of free base in that
17 system, vapor plus the droplet, was as high as 12 or
18 13 percent, and by the time you get up to levels of,
19 say, 6.4, which represents cigarettes that are
20 commercially available, and particularly this was
21 done with a Merit cigarette, the free base
22 concentration -- free base amount, the total amount
23 of free base in the system, 50 percent, five zero
24 percent, even though the Henderson Haselbach equation
25 would tell you that the amount of free base in the

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1 droplet at a pH of 6.4 is only about two percent.
2 And this is because it only talks to the liquid phase
3 and not to the vapor phase, and -- but it's the vapor
4 phase that's key.

5 So you can see that you can be misled by just
6 buying into the Henderson Haselbach equation as a
7 means of determining what the real importance is, and
8 that is, how much is total -- of the total nicotine,
9 how much is free base? And you can see that you can
10 get very, very significant amounts with really very
11 little changes in the pH. Going from 4.8 to six, it
12 can go from 12 to 50 percent. That's significant.
13 And that's why it's such a critical and important
14 issue to this industry. Which is why, in their
15 research and development laboratories, they drove and
16 they drove and they worked and they worked to
17 manipulate nicotine in such a way as to take
18 advantage of this, and they never told anybody
19 outside of the walls of their research and
20 development citadel they were doing this.

21 MR. CIRESI: Thank you, doctor. I have
22 no --

23 MR. BLEAKLEY: Move to strike the last
24 statement. Again, it exceeds the scope of direct
25 examination. We were not permitted to pursue the

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1 issue of what was said to people on the outside.
2 THE COURT: Well, I'll let the answer
3 stand.

4 MR. CIRESI: Thank you, doctor.

5 THE COURT: Why don't we recess for lunch,
6 reconvene at 1:40.

7 THE CLERK: Court stands in recess to
8 reconvene at 1:40.

9 (Recess taken.)

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1 AFTERNOON SESSION.
2 THE CLERK: All rise. Court is again in
3 session.

4 (Jury enters the courtroom.)
5 THE CLERK: Please be seated.
6 MR. BLEAKLEY: Good afternoon.
7 (Collective "Good afternoon.")
8 RECROSS-EXAMINATION

9 BY MR. BERNICK:
10 Q. Good afternoon, Dr. Robertson. I think we're
11 probably on the home stretch here.
12 (Discussion off the record.)
13 Q. I just want to follow up on two areas that were
14 covered on redirect examination.
15 First, with regard to the fortunes of the
16 different companies, I think you told us that Philip
17 Morris started first with ammoniation and now is
18 number one?
19 A. Yes.
20 Q. And then you said Reynolds is number two and B&W
21 is number three and Lorillard is number four. Was
22 that your testimony?
23 A. That's my understanding of the relative
24 rankings, yes.
25 Q. But in point of fact, the company that was

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1 actually second to start using ammonia was the
2 American Tobacco Company; correct?
3 A. Yes. And we covered that in the redirect.
4 Q. And it turns out that American Tobacco, even
5 though it used ammoniated recon from the late 1960s,
6 couldn't make an impression on its market share
7 decline even after using ammonia for upwards of ten
8 years; correct?
9 A. In terms of relating it directly to ammoniation,
10 that appears to have been the case.
11 Q. And when American started to use ammonia again
12 in the late '80s and early '90s, isn't it true that
13 ammonia did nothing to help it recover its market
14 share?
15 A. You're right. It's sort of like a company who

16 might come out with -- let's say in the automobile
17 industry, they come out with a fuel injection system,
18 and suddenly, because of the fuel injection system,
19 their sales take off. And then somebody else comes
20 along and says, "Boy, we better put fuel injection
21 into our automobiles." And they might be able to tag
22 along on that. And then the third comes along and so
23 forth. But at some point it tends to lose its
24 uniqueness. And I can't track exactly what happened
25 in terms of American Tobacco Company because I don't

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1 know what else was going on that would affect their
2 share of market with regard to advertising or to the
3 taste of their products or other of the many
4 variables that account for one's share of market.

5 Q. But in point of fact, American, with its fuel
6 injection ammoniated recon, was never able to enable
7 it to use it to recover market share; correct?

8 MR. CIRESI: Objection, asked and answered.

9 THE COURT: You can answer it again.

10 A. Well they started and they stopped and they
11 started again, and they didn't -- they didn't
12 recover. The other ones took off in order and that
13 order still remains.

14 Q. Well let's talk about that.

15 Isn't it a fact that Lorillard actually has the
16 number two brand today?

17 A. I think we're --

18 I was talking about the overall rankings of the
19 companies in terms of sales --

20 Q. Oh.

21 A. -- as opposed to a particular brand within them.

22 Q. I'm talking about the brands.

23 Lorillard is a small company, but it's got the
24 number two brand in the country; correct?

25 A. I'm not aware of that.

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1 Q. Do you know what the number --

2 Do you know what brands Lorillard makes?

3 A. I'm drawing a blank on that.

4 Q. Okay. Do you know why it is --

5 Brown & Williamson has a Kool product; right?

6 A. They do have the Kool product, that's right.

7 Q. Do you know what the competitive Kool product is
8 between B&W and Lorillard; that is, what Lorillard
9 uses in the menthol area?

10 A. Newport or --

11 I'm just guessing because I'm just not pulling
12 it out of my head right now.

13 Q. Do you know why it is that B&W's -- do you know
14 what the differences are --

15 Well let me ask you this: B&W now comes out
16 with its product. Do you know how B&W's ammoniated
17 recons have competed with Reynolds' ammoniated
18 recons?

19 A. In what way?

20 Q. In any way. Do you know how these brands here

21 at B&W have fared versus Reynolds' brands?
22 A. Brand by brand, no, I don't have that in my
23 head.
24 Q. Any kind of brand in any kind of way.
25 A. Well I gave you the relative overall rankings.

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1 That was the -- that was what I did.
2 Q. What you talked to me about was the size of the
3 companies, but you really don't know whether in fact
4 the competition between the brands has anything to do
5 with pH; do you?
6 A. Well if you say do I know or do I not know, I
7 would certainly expect that to be the -- be the case,
8 but I don't have details that I can give you one
9 against one, I mean in my head.
10 Q. You can't testify as an expert as to how the
11 brands compete among one another and whether they do
12 on the basis of pH; correct?
13 A. Well what I can tell you is that within each
14 company, pH and nicotine manipulation, of which pH is
15 a form, is very important in terms of the -- where a
16 brand -- or how a brand -- how a brand behaves in the
17 marketplace. I mean that was clear from the -- from
18 the documents.
19 Q. Today, can you tell us that pH is a significant
20 factor in competition between brands? "Yes" or
21 "no."
22 MR. CIRESI: Well I'm going to object to
23 that. Discovery was cut off as of 1994.
24 MR. BLEAKLEY: As of 1994.
25 THE COURT: Objection is sustained.

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1 Q. As of 1994. Excuse me.
2 A. Certainly -- certainly the documents point to
3 that, clearly, that pH was a very important
4 consideration in distinguishing brands.
5 Q. 1994, can you tell us any two brands and how
6 they competed on the basis of pH?
7 A. Well I can tell you what I saw in the documents,
8 and what I saw in the documents was, yes, pH was a
9 very important factor. We -- we all saw them
10 together with regard to brand distinction and share
11 of market.
12 Q. Again in 1994, can you tell me how pH played
13 into the competition as between any two brands?
14 MR. CIRESI: Objection, asked and answered.
15 THE COURT: It's been asked and answered.
16 Q. You said that ammonia --
17 I think you characterized some of these charts
18 that isolated the contribution of different elements
19 as being simplistic. Do you remember your testimony
20 on redirect examination?
21 A. Well that's because the -- the entire cigarette
22 construction is -- involves many, many variables, of
23 which the ones we talked about were among them, but
24 certainly not all of them.
25 Q. Let's take Brown & Williamson's recon and all of

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1 the different factors that go into that recon, recon
2 in its totality. Isn't it a fact that if you add more
3 and more Brown & Williamson recon to the blend, pH
4 goes down rather than up?
5 A. Well do you have some data you want to show me?
6 I'll take a look at it.
7 Q. Do you know?
8 A. Because if -- because if you're adding more and
9 more recon, you're taking out something else, and I
10 don't know what effect that's going to have.
11 Q. In fact, the ammoniated recon that's used is
12 lower in pH than the traditional burleys; correct?
13 A. Typically the recons are.
14 Q. And could we --
15 A. The paper recons.
16 Q. Including the ammoniated recons. The ammoniated
17 recons are lower in pH than the traditional burleys
18 that go into cigarettes; correct?
19 A. You're talking about the pH of the substrate
20 itself?
21 Q. Talking about the pH of the recon. When the
22 recon comes out the end of the plant, Brown &
23 Williamson's ammoniated recon at the end of the
24 plant, isn't it true that the pH's are lower than the
25 burley tobaccos that traditionally have been used?

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1 A. Well there's a variation in pH in terms of the
2 burley tobaccos, and the pH of the smoke is not
3 necessarily well correlated to the pH of the
4 substrate anyway, and that's what counts.
5 Q. Well can you answer my question? Is the pH --
6 is the pH of the recon that comes out of the end of
7 B&W's plant lower than the burleys that had been
8 traditionally used?
9 MR. CIRESI: Objection, Your Honor, asked
10 and answered.
11 THE COURT: You can answer that.
12 A. Well I don't know what recon's coming out of
13 what plant with what pH. This varies all over the
14 place. And if you talk about the pH of burley in
15 just one fell swoop, that varies as well. And what I
16 told you was the pH of the substrate itself does not
17 represent what the pH of the smoke is going to be
18 necessarily.
19 Q. Let's go back to the second area that you
20 covered on redirect, which is the
21 threshold-level-of-addiction proposal that was made
22 by Dr. Benowitz in 1994. It's this one here, it's
23 GK16. Could you get that in front of you? It's
24 volume one, tab 19. Doctor --
25 Do you have that in front of you? I'm sorry,

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1 Dr. Robertson. Do you have that in front of you?

2 This is actually a -- ends up being a proposal that's
3 made by Dr. Benowitz; correct, a possible strategy
4 for regulation?

5 A. Yes, it's a -- it's a suggestion by Benowitz and
6 Henningfield as to what should be done in order to
7 reduce the number of millions and millions of
8 premature deaths caused by tobacco use. That's what
9 it says.

10 Q. Under their proposal smoke deliveries have come
11 down, and they talk about what to do to get a
12 threshold for nicotine that is low enough -- that
13 nicotine down here -- that is so low that people
14 won't get addicted. That's basically what they're
15 proposing; right?

16 A. Yeah. They propose a level of nicotine in
17 cigarettes that they believe to be such that, when
18 smoked, they will -- and when smoked even
19 intensively, they will be below an addictive
20 threshold, and that will improve the situation.

21 Q. Okay. Now they note at the back page that other
22 researchers have proposed a strategy -- that is, this
23 one -- other researchers have proposed the
24 introduction of safer cigarettes that are enriched
25 with nicotine in order to reduce the ratio of tar to

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1 nicotine. Do you see that?

2 A. Yes.

3 Q. And that -- that would be a proposal where the
4 tars have come down, but nicotine is raised so as to
5 give people more nicotine, enabling them to smoke
6 less tar. That would be what's discussed here;
7 correct?

8 A. That appears to be the case, yes.

9 Q. And if you take a look at who it is that they're
10 talking about here, that was a proposal made by M. A.
11 Russell 20 years ago, 1976; correct?

12 A. That's who they reference.

13 Q. Okay. And the theory driving this proposal is
14 that people -- if you take the nicotines down,
15 they'll compensate, and to prevent them from
16 compensating, you give them the nicotine so that they
17 won't compensate, they'll just get the lower tar;
18 correct?

19 A. They said, "Rationale for such cigarettes is
20 that smokers would need to inhale less smoke to
21 obtain the desired dose of nicotine."

22 Q. So the rationale is that compensation generally
23 takes place, and the idea is to stop it; right?

24 A. No. I think the idea here is to stop people
25 from being addicted.

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1 Q. I understand that. But you stop them from being
2 addicted by delivering a lot of nicotine, thereby
3 enabling them to stay with the lower tar delivery;
4 correct?

5 A. I don't understand that.

6 Q. The idea is that in order to get people to smoke

7 down here at those low tars, you'd give them enough
8 nicotine so that they won't compensate upwards.
9 That's the whole rationale for that proposal; right?
10 A. No. Sounds to me like all they are talking
11 about here is lowering the tar, which they felt would
12 be a safer cigarette, but with the nicotine levels up
13 in the addictive range, the people are still
14 addicted, and it goes on to say that that strategy
15 involving nicotine-enriched cigarettes might reduce
16 morbidity and mortality from cigarette smoking, but
17 the reduction would probably be limited, because even
18 at reduced doses tobacco smoke is highly toxic.

19 Q. I understand.

20 A. Which gave rise to Henningfield's and Benowitz's
21 proposal.

22 Q. I understand that. That's what we're reading.

23 The first sentence says, "It should be noted
24 that other researchers have proposed the introduction
25 of safer cigarettes that are enriched with nicotine

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1 in order to reduce the ratio of tar to nicotine. The
2 rationale for such cigarettes is that smokers would
3 need to inhale less in order to obtain the desired
4 dose for nicotine."

5 The whole idea is to have those nicotine levels
6 be high; right? That's what it says.

7 A. That's what it says, and that, of course, would
8 still potentially put people in the situation where
9 they're addicted so that they're still getting tar.
10 Even though the tar levels are low, as they say in
11 here, that's a problem, because the tar is still
12 toxic.

13 Q. So their proposal is different. What they're
14 proposing is to bring the nicotine deliveries all the
15 way down; correct?

16 A. Their reason for doing that is so people --

17 Q. Is that what -- is that what their proposal is,
18 Dr. Robertson?

19 A. You interrupted me.

20 Q. I understand. But you're telling me the reason,
21 I'm just asking the proposal.

22 THE COURT: Counsel, counsel, let him
23 finish his answer, please.

24 MR. BLEAKLEY: Go ahead.

25 A. What they're proposing, which is very

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1 distinctive from the other proposal, is to assure
2 people are no longer addicted to the product. Then,
3 in their proposal, the problem will begin to
4 disappear with time because there will be no reason
5 for people to smoke or to continue smoking, and in
6 the long term they won't be taking in tar.

7 Q. Their proposal assumes that
8 overcompensation -- what are their words -- appears
9 not to persist; correct? That's what they say.

10 A. They refer to someone else, and that's what they
11 quote --

12 Q. That's what they quote.
13 A. -- from somebody else's work.
14 Q. From somebody else's --
15 You don't think that they subscribe to this?
16 A. I don't know if they do. They certainly --
17 They quoted it, but I think perhaps when they --
18 when they wrote this, they may not have known as much
19 about compensation as the industry did. They
20 probably weren't playing with a full deck of cards.
21 Q. Oh, I see. So you think that this is something
22 they said, but they didn't know the truth?
23 A. They didn't know --
24 They didn't have all the facts.
25 Q. So you don't think that this represents an

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1 informed opinion.
2 A. It represents someone's informed opinion, but I
3 don't know if it's informed enough.
4 Q. Let's talk --
5 A. It certainly doesn't --
6 Q. -- about threshold --
7 Sorry?
8 A. It certainly doesn't square with what are in the
9 documents.
10 Q. Let's talk about what that threshold is.
11 Could you tell me, looking over to the other
12 page, what the threshold is that they propose for
13 nicotine?
14 A. Well they talk about a target daily dose of five
15 milligrams of less to avert -- to avert addiction.
16 Q. It's five milligrams or less per day; right?
17 What do they say per cigarette?
18 A. "An absolute limit of .4 to .5 milligrams of
19 nicotine per cigarette should be adequate to prevent
20 or limit the development of addiction in most young
21 people."
22 Q. Okay.
23 A. "At the same time, it may provide enough
24 nicotine for taste and sensory stimulation."
25 Q. Okay. Now I want you to tell me all of the

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1 cigarettes that are on the marketplace which meets
2 that threshold.
3 A. Well this is the most that they could extract
4 out of a cigarette, and the lowest cigarette on the
5 market that I'm aware of is .1 milligram. But of
6 course that's not the delivery they're talking about
7 here.
8 Q. No? What is it?
9 A. No, because that's the FTC delivery.
10 Q. Okay.
11 A. You can take a Merit at .1 milligram and smoke
12 it up to more than .5.
13 Q. Okay. First let's deal with the FTC deliveries.
14 Is it true that there are FT -- there are a number of
15 cigarettes that are put out that have FTC deliveries
16 below the threshold mentioned in that article?

17 A. I wouldn't know if it's "a number," but there --
18 I do know there are cigarettes that are reported FTC
19 less than .4.
20 Q. Now?
21 A. Excuse me?
22 Q. Now cigarettes?
23 A. Oh. I believe so. Now, Carlton, Merit.
24 Q. Do you know what the rated delivery --
25 Do you know what the actual deliveries were for
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1 the Next product when it was out on the marketplace,
2 Philip Morris Next product?
3 A. What do you mean "actual deliveries?" They can
4 be anything you want --
5 Q. Okay.
6 A. -- within the range.
7 Q. When they measured the Next product in the
8 machine, what were the deliveries?
9 A. Well I think that once you get below a certain
10 level, the --
11 The machine is not all that sensitive. As I
12 recall, when you get below the .05 levels, it's
13 just -- less than .05. I think it was in that -- in
14 that range. It was below .1.
15 Q. Now if we assume for purposes of your testimony
16 that what Drs. Henningfield and Benowitz said when
17 they said overcompensation appears not to persist was
18 a statement of their own views and their own
19 article -- I want you to assume that for purposes of
20 my question -- isn't it a fact that all of these
21 different products in fact do meet the threshold that
22 was suggested by Benowitz and Henningfield?
23 A. Well if you're saying that you can take a
24 Next -- a Next product and people are going to smoke
25 it and not attempt to overcompensate and leave it,

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1 which is what happened, that's kind of a imaginary
2 hypothesis here because you've already tested that in
3 the marketplace and shown that it doesn't work.
4 MR. BERNICK: Move to strike as
5 non-responsive, Your Honor.

6 THE COURT: It is non-responsive.
7 Q. I want you to assume, Dr. Robertson, that what
8 these researchers, these authors said when they said
9 overcompensation appears not to persist, that that's
10 true. I want you to assume that that statement in
11 that article is true. Is it a fact that the
12 companies have indeed put out several different
13 products that come in below the threshold recommended
14 by Benowitz and Henningfield?

15 A. Well if you -- you're going to coral me into a
16 situation, which evidently is not the case based on
17 your own documents, and you tell me that people can't
18 smoke those up to the .4 or .5 milligram limit, then
19 they'd be below the .4 or .5 milligram limit which --
20 which they suggested. And I think it's fair to say
21 that even -- even that is a suggestion, because they

22 point out, as I recall in the article, that that in
23 itself -- let's see where it was. "That restricting
24 levels of nicotine would prevent addiction needs to
25 be verify empirically. There is concern that for

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1 already addicted adult smokers, reducing the nicotine
2 level in tobacco might result in more intensive
3 compensatory smoking with increased exposure to toxic
4 combustion products such as carbon monoxide and tar."

5 So this is a proposal. They're not quite sure
6 how it's going to work out, but that's the direction
7 in which they want to move.

8 Q. I don't think that I've clearly communicated the
9 assumption that I want you to make. I want you to
10 assume that Benowitz and Henningfield --

11 Those people are authorities in the area of
12 compensatory behavior; are they not?

13 A. Well I know they've written about it, and I
14 would -- I would presume they know a lot about it,
15 yes.

16 Q. I want you to assume that those people, who are
17 authorities in the area of compensatory behavior,
18 were saying that -- were saying -- correct me -- that
19 overcompensation appears not to persist, not that
20 people can't smoke more if they want to, but that
21 they don't long term, I want you to assume that
22 they're correct in the statement that they've made.

23 If you assume that they're correct in the
24 statement that they've made, isn't it a fact that all
25 of these brands are below the threshold?

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1 MR. CIRERI: Objection to the form of the
2 question. It's compound, and also it's been asked
3 and answered.

4 THE COURT: It's been asked and answered.

5 MR. BLEAKLEY: Thank you. I have no
6 further questions, Your Honor.

7 MR. CIRERI: Just one, doctor.

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1 RE-REDIRECT EXAMINATION
2 BY MR. CIRESI:
3 Q. Did the defendants' documents over 30 years --
4 THE COURT: Counsel.
5 A. -- reflect --
6 MR. CIRESI: I have to -- I'm sorry, Your
7 Honor.
8 Q. Did the defendants' documents over 30 years
9 reflect that smokers compensated and that the
10 defendants knew?
11 MR. BLEAKLEY: Objection, it's leading and
12 it's simply repetitive of direct examination and
13 redirect.
14 THE COURT: You may answer that.
15 A. Yes, they knew, and they designed for it.
16 MR. CIRESI: I have no further questions.
17 Thank you, doctor.
18 THE COURT: You may step down.
19 (Witness excused.)
20 MR. CIRESI: Your Honor, we have to move a
21 lot of materials to get the next witness and move the
22 Elmo. Could we take like maybe a five-minute break?
23 THE COURT: All right. We'll take a short
24 recess.
25 THE CLERK: Court stands in recess.

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1 (Recess taken.)
2 THE CLERK: All rise. Court is again in
3 session.
4 (The following proceedings were held
5 out of the presence of the jury in open
6 court.)
7 THE CLERK: Please be seated.
8 MR. BERNICK: Thank you for hearing this
9 objection, Your Honor.
10 With regard to Trial Exhibit 21905 and 21951,
11 these are documents as to which privilege has been
12 claimed by American Tobacco Company. Those
13 privileges have been timely lodged and have been
14 recorded in accordance with the court's procedures.
15 We understand that, according to Your Honor's prior
16 order, they were directed to be produced to the other
17 side, and we are not here to re-argue any aspect of
18 that. We do believe, however, that these documents
19 remain privileged documents and should not become
20 before the jury, and we're prepared to address that
21 issue.
22 I didn't want to have to raise the issue in
23 front of the jury. I didn't believe that was
24 appropriate.
25 There's also a cover letter -- I don't happen to

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1 have it here with me right now. It's been
2 previously, I believe, noted to the court in papers

3 submitted to the court -- goes along with 21905,
4 which is important to its privileged status, and I
5 just want to make sure the record is clear on that.
6

7 So we believe these documents should not come
8 before the jury, both because they're privileged and
9 due to their privilege status because of Rule 403
10 considerations, and we will urge the court not to
allow them into evidence.

11 THE COURT: Counsel.

12 MS. WALBURN: Good afternoon.

13 Both of these documents were encompassed by the
14 court's order of December 30 striking certain things
15 as privileged by American Tobacco for sanctions for
16 failure to produce relevant documents during the long
17 discovery period. In addition to striking those
18 claims of privilege and that basis, neither document
19 is properly subject to a claim of privilege either
20 because it's subject to the crime fraud exception or
21 because it merely discusses scientific research and
22 not information that would be covered by the
23 attorney-client or work-product privileges.

24 I believe the court is familiar with both
25 documents and I won't cite them in detail here until

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1 the court rules, but I would point out that counsel
2 for American, Mr. Bernick, has repeatedly throughout
3 this trial made specific references in
4 cross-examination of witnesses relating to American
5 documents knowing full well the status of discovery.
6 Simply put, these are among the few probative
7 documents we have with respect to American Tobacco.
8 The court has already ruled on the status of
9 privilege. The test now is whether the documents are
10 relevant, and both are clearly relevant to these
11 proceedings. One discusses admissions of causation
12 with respect to beagle inhalation test experiments,
13 admissions that the tobacco industry to date has not
14 made publicly, and the other document explicitly
15 references lawyers' impressions of biological
16 research in the 1960s.

17 THE COURT: The only rulings remaining as
18 to those two documents are relevance, and you may
19 make that objection at the time of their
20 introduction.

21 MR. BERNICK: Thank you. Would that also
22 include Rule 403 considerations?

23 THE COURT: That's correct.

24 MR. BERNICK: Thank you.

25 (Jury enters the courtroom.)

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1 THE CLERK: Please be seated.

2 THE COURT: Counsel.

3 MR. CIRESI: Thank you, Your Honor.

4 Plaintiffs call Mr. Walker Merryman for
5 cross-examination as an adverse witness under the
6 rules.

7 MR. BLEAKLEY: Your Honor, we would ask

8 the court to instruct the jury as to what the
9 technical meaning of an adverse witness is so they'll
10 understand what it means.

11 THE COURT: You will come --
12 Please be seated.

13 THE WITNESS: Okay.
14 THE COURT: You will come to learn that
15 there is a process which allows a party to call a
16 witness, many times this will be a witness that is a
17 representative of the other side, and they have the
18 opportunity to bring them to the witness stand, and
19 he will -- it will be obvious in most instances -- be
20 a witness that is adverse to the interests of the
21 party calling him. And because of that, the witness
22 that's being called will be subject to what we
23 call -- what used to be called cross-examination
24 under the rules, but the net effect of it is to allow
25 the party calling this witness to ask leading

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1 questions, because it in most instances will be
2 assumed that this witness's interests are adverse to
3 the party that called him.

4 So you'll see that the questioning that will be
5 asked will be leading questions, and he will be
6 treating him as what we would term a hostile witness,
7 although I trust Mr. Merryman will not necessarily be
8 hostile.

9 MR. BLEAKLEY: Thank you, Your Honor.
10 (Witness sworn.)

11 THE CLERK: Please state your name for the
12 record.

13 THE WITNESS: Walker Merryman.

14 THE CLERK: Thank you. Please have a seat.

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1 WALKER N. MERRYMAN
2 called as a witness, being first
3 duly sworn, was examined and testified
4 as follows:

5 ADVERSE EXAMINATION

6 BY MR. CIRESI:

7 Q. Good afternoon, Mr. Merryman.

8 A. Good afternoon.

9 Q. You and I haven't met before, sir?

10 A. We have not.

11 Q. Okay. You are employed by The Tobacco
12 Institute?

13 A. Yes, sir.
14 Q. You've been employed by The Tobacco Institute
15 since approximately 1976; correct?
16 A. Yes, sir.

17 (Discussion off the record.)
18 BY MR. CIRESI:

19 Q. Before that you were a -- is it a TV announcer?
20 A. I was a newsman.

21 Q. Okay. And that was down in Iowa?
22 A. Among other places. Iowa, South Dakota,
23 Nebraska. Yes, sir.

24 Q. And how long were you a newsman?
25 A. I served in that capacity in a number of places

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1 for about five or six years.

2 Q. Did you read the news, or were you an
3 investigative reporter?

4 A. Well I prepared newscasts, I wrote them,
5 produced them. In addition, I researched and
6 prepared documentary broadcasts. I also was on
7 occasion an anchorman.

8 Q. And the documentary broadcasts that you
9 prepared, those would be investigative documentaries?

10 A. Yes, sir, to an extent.

11 Q. Now sir, you're presently the vice-president,
12 director of communications for The Tobacco Institute?

13 A. Yes, that's right.

14 Q. How long have you held that specific position?

15 A. Since approximately 1981 or '82.

16 Q. When you assumed employment with The Tobacco
17 Institute in 1976, what position did you hold?

18 A. The position title was assistant to the
19 president.

20 Q. And who was the president at that time?

21 A. Horace Kornegay.

22 Q. And how long had Mr. Kornegay been the president
23 as of 1976?

24 A. I believe Mr. Kornegay became president of the
25 Institute in 1971.

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1 Q. How long did he remain as president after you
2 started with The Tobacco Institute in 1976?

3 A. Mr. Kornegay retired in the mid-1980s. I -- I
4 don't recall the date.

5 Q. And his successor was whom, sir?

6 A. Samuel Chilcote.

7 Q. And how long did Mr. Chilcote hold the position
8 of president of The Tobacco Institute?

9 A. Mr. Chilcote remains in that position today.

10 Q. Have you served as an assistant to him in
11 addition to your job as a vice-president, director of
12 communications?

13 A. No. My position is vice-president and director
14 of communications.

15 Q. Can you describe for the ladies and gentlemen of
16 the jury and the court your general duties as
17 vice-president, director of communications for The

18 Tobacco Institute?
19 A. Generally speaking, I'm responsible for
20 responding to inquiries from the news media. If we
21 get a call from a reporter, it's my job to try to
22 respond to that reporter if I can, if I have the
23 information, and if it's something that we can
24 respond to.

25 Q. Do you respond to issues regarding smoking and
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1 health?

2 A. On occasion. If the reporter asks, we do, yes,
3 sir.

4 Q. And do you specifically respond to inquiries?

5 A. Certainly not all of them. We might not have
6 the information. But on occasion we have, yes, sir.

7 Q. And I'm asking now just about you. Let's put
8 The Tobacco Institute aside for a minute, Mr.
9 Merryman.

10 Have you yourself responded to specific
11 inquiries regarding smoking and health, inquiries
12 directed to The Tobacco Institute by the media?

13 A. I myself have responded to questions from
14 reporters about smoking-and-health issues, yes, sir.
15 Q. And would it be fair to state that from the time
16 you started in 1971 right up to today, you have never
17 admitted, as the spokesman for The Tobacco Institute,
18 that smoking causes lung cancer?

19 A. I began with the Institute in 1976, rather than
20 71 as you stated.

21 Q. Excuse me, 1976.

22 A. It's quite true that the position of the
23 Institute that I have articulated is that we don't
24 believe it's ever been established that smoking is a
25 cause of disease.

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1 Q. So that it would be fair to state that, not only
2 with regard to lung cancer, with regard to any
3 disease, you on behalf of The Tobacco Institute have
4 never stated that smoking causes any disease; is that
5 correct?

6 A. I've never stated that we believe it's been
7 proven that smoking causes disease, yes, sir.

8 Q. Are you married, sir?

9 A. I am.

10 Q. Any children?

11 A. No, sir.

12 Q. Are you a smoker?

13 A. No, sir.

14 Q. When did you quit?

15 A. Oh, about a year and a half ago.

16 Q. Now during the course of your career from 1976
17 up to the present time in working for The Tobacco
18 Institute, have you had an understanding with regard
19 to who funds The Tobacco Institute?

20 A. Yes, sir, it's very clear who funds the
21 Institute. The member companies, the companies that
22 manufacture tobacco products.

23 Q. Okay. So Philip Morris funds it?
24 A. Philip Morris is one of our members, yes, sir.
25 Q. RJR funds The Tobacco Institute?

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1 A. R. J. Reynolds, yes, sir, they're a member as
2 well.
3 Q. Brown & Williamson?
4 A. Yes, sir.
5 Q. American?
6 A. No, sir, American is not a separate company.
7 Q. Was American a member of the Institute before it
8 was purchased by Brown & Williamson?
9 A. From time to time it was, yes, sir.
10 Q. Lorillard --
11 A. Yes.
12 Q. -- funds the Institute?
13 A. Yes, sir. Lorillard is one of our members.
14 Q. And Liggett was a membership -- a member, excuse
15 me, of the Institute?
16 A. They have been in the past. They are not
17 presently.
18 Q. And they ceased to be a member in 1995?
19 A. I'm sorry, sir, I don't know when that was.
20 Q. Well you know that it was when they admitted
21 publicly that smoking was addictive; isn't that
22 correct?
23 A. I don't know that, no, sir.
24 Q. Weren't they asked to leave at that time?
25 A. That's really an administrative detail that's

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1 not something I'd be aware of, sir.
2 Q. You mean you're the vice-president of
3 communications, Liggett quit or was forced out, and
4 you didn't even ask?
5 A. That's not something that I'd be aware of. No,
6 sir.
7 Q. Just had no curiosity about why Liggett left?
8 A. Liggett decided to leave, or however it
9 occurred; it's not something that was brought to my
10 attention.
11 Q. You didn't talk to Mr. Chilcote about that?
12 A. No, sir.
13 Q. You didn't talk to anybody in The Tobacco
14 Institute about that?
15 A. No, sir.
16 Q. You didn't call up any of the other tobacco
17 companies and say, "Say, why did Liggett leave?"
18 Nothing like that?
19 A. No, sir. That doesn't seem to be something that
20 I would need to know in the general course of my
21 business.
22 Q. Just not a matter of concern at all; is that
23 right?
24 A. If a company makes a decision or a decision is
25 made with respect to that company, there's not really

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1 anything that I can have an impact on with respect to
2 that decision.

3 Q. Well, let's see if we can get a temporal
4 association.

5 Would you agree, Mr. Merryman, that the time
6 that Liggett left was the time that they publicly
7 admitted that cigarette smoking was addictive?

8 A. I can't tell you when Liggett left. I simply
9 don't recall. It doesn't -- it didn't make an
10 impression on me.

11 Q. What --

12 Didn't Liggett enter into a settlement with
13 various states around the country and it was the
14 first settlement ever by a tobacco company? Isn't
15 that true?

16 A. That's not an issue that we at The Tobacco
17 Institute would have talked about to the news media.

18 Q. That's not --

19 A. That's not something that we were -- that we
20 were authorized to speak to the news media about.

21 Q. But you were --

22 A. So it's not something, sir, that I would have
23 had information on.

24 Q. But you watch TV; don't you?

25 A. Oh, I'm generally aware of it, sir, but beyond
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1 that I don't have any specific knowledge of it.

2 Q. You watch TV; don't you?

3 A. I occasionally do.

4 Q. Read the papers?

5 A. Yes, sir.

6 Q. Listen to the radio?

7 A. Sometimes.

8 Q. Try to keep abreast of what's going on in your
9 industry?

10 A. Yes, sir.

11 Q. And there was tremendous publicity, wasn't
12 there, about the fact that Liggett admitted that
13 cigarette smoking was addictive?

14 A. I don't know if I could characterize the nature
15 of the publicity. Certainly there was some.

16 Q. Ahh. So you were aware of it then.

17 A. I was aware of some publicity. As I said, I was
18 generally aware of the subject.

19 Q. And at that time was when Liggett left The
20 Tobacco Institute; isn't that right?

21 A. I do not know, sir.

22 Q. Just don't recall.

23 A. I do not.

24 Q. Don't know one way or the other.

25 A. I do not.

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2701

1 Q. Well you would agree, would you not, sir, that
2 it's indisputable as a general proposition that if
3 someone is addicted to a substance, they do not have

4 free choice of deciding whether or not to use that
5 substance?
6 A. It seems to me that if someone is truly
7 addicted, as I would use that word, then free choice
8 probably doesn't enter into it.
9 Q. It would be indisputable; wouldn't it, sir?
10 A. I don't know if I'd use the word "indisputable."
11 I think I'm comfortable with my answer to your
12 question.
13 Q. All right. Can you look at your deposition up
14 there and direct your attention, please, to page 449.
15 And first of all, Mr. Merryman, do you recall
16 having your deposition taken on July 15th and 16th of
17 1997?
18 A. Yes, sir, I recall the deposition.
19 Q. And you recall you were under oath at the time?
20 A. Yes, sir.
21 Q. Okay. And please direct your attention to page
22 449 of that deposition. And did you give the
23 following answer to the following question:
24 "Question: But you would agree as a general
25 proposition that if someone is addicted to a

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1 substance, they do not have free choice in deciding
2 whether or not to use it?
3 "Answer: I -- I think that -- as that's stated,
4 it's indisputable."
5 Do you agree with that?
6 A. Yes, sir.
7 Q. And that's what you gave on July 16th, 1997
8 under oath; correct?
9 A. Correct.
10 Q. So it's indisputable that if one is addicted,
11 they don't have free choice; isn't that correct, sir?
12 MR. BLEAKLEY: Your Honor, I just want to
13 state for the record now that was not proper use of
14 this deposition. It did not impeach anything that.
15 MR. MONICA: Merryman said here, it was not
16 inconsistent with what he said here. And we went
17 through this a number of times when prior witnesses
18 have testified and Mr. Ciresi objected.
19 THE COURT: I understood the witness to
20 deny that it was indisputable, and I think the
21 impeachment is the word "indisputable," which he now
22 admits he said in the deposition, so that would be
23 proper impeachment.

24 MR. BLEAKLEY: I don't think the record
25 will show that he denied that it was indisputable,

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1 but --

2 THE COURT: Would you like the question
3 read back?

4 MR. BLEAKLEY: No, Your Honor.

5 BY MR. CIRESI:

6 Q. Sir, if a smoker, then, is addicted -- I want
7 you to assume that -- if a smoker is addicted, be it
8 a smoker of any age, you would agree, then, that that

9 person doesn't have free choice to stop using that
10 substance; isn't that right?

11 A. I don't agree with the use of the word
12 "addiction" when it comes to smoking, sir, so I
13 wouldn't, no.

14 Q. I understand you don't. I'm asking you to
15 assume that to be true.

16 A. If I can't accept the use of the word in that
17 regard, I -- I don't think I can assume it to be
18 true, sir.

19 Q. Well the rules of court allow me to ask you to
20 assume that to be true, --

21 A. All right.

22 Q. -- Mr. Merryman. All right?

23 A. All right.

24 Q. And if it is true, then it's indisputable that
25 that smoker does not have free choice; correct?

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2704

1 A. Using those words the way you've used
2 them -- and as I say, I don't agree with the use of
3 the word "addiction" there -- then that's true, yes,
4 sir.

5 Q. Thank you.

6 Now have you ever asked any of the member
7 companies that you work for whether or not they
8 consider smoking to be addictive?

9 A. Well the guidance we received from our member
10 companies certainly would indicate that they don't
11 believe that with respect to using the word
12 "addiction" and smoking, that that's proper. I don't
13 think it's proper. I know a lot of people do, but I
14 don't think it's proper to say that smoking a
15 cigarette is the same thing as using heroin or crack.

16 Q. The Surgeon General said that in 1988; correct?

17 A. He equated -- as I recall, the Surgeon General
18 equated smoking a cigarette with using heroin and
19 crack.

20 Q. Thank you.

21 Now my question to you is this: Have you asked
22 any of the scientists at any of the member companies
23 of The Tobacco Institute whether they consider
24 smoking addictive?

25 A. No, sir. I don't have regular contact, really
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2705

1 any contact to speak of with scientists at the
2 company. My contact would come at another level.

3 Q. Your contact comes through the lawyers; correct?
4 A. No, my contact comes from people in the public
5 relations area of the companies.

6 Q. Are the people in the public relations areas of
7 the companies learned in the medical sciences?

8 A. Well I would ask them for information which they
9 would get from other people at the companies. I'm
10 sure that that's the way it would work, sir.

11 Q. Well you're the one that does it, not me. So
12 you say you're sure that's the way it would work.

13 Let me ask my question again. Okay? Do you

14 know if any of the PR people you talk with are
15 learned in the medical sciences? "Yes" or "no."
16 A. I guess it depends on what you mean by "learned
17 in the medical sciences."
18 Q. Are they Ph.D.'s?
19 A. I don't know.
20 Q. Are they medical doctors?
21 A. I don't know of any one in the public relations
22 field who's a medical doctor, no, sir.
23 Q. Are they psychologists or psychiatrists?
24 A. I don't know.
25 Q. So you wouldn't know if they were learned in the

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1 medical sciences; is that right?
2 A. If that's what you mean by "learned in the
3 medical sciences," then I would not, no, sir.
4 Q. So as I understand it, PR people from the
5 companies give you information; is that right?
6 A. I would ask my colleagues at our member
7 companies for information on -- on subjects, and they
8 would report back to me on what they found.
9 Q. Did you ask them who they got the information
10 from?
11 A. I cannot sit here and tell you I can think of a
12 specific instance where that occurred, no, sir.
13 Q. Did you ask for any written materials analyzing
14 issues of smoking and health?
15 A. We have received material on smoking and health
16 over the years. Not recently. It's been an awfully
17 long time since we've received anything on the
18 smoking-and-health issue. And we certainly have
19 issued material from The Tobacco Institute that is
20 responsive to smoking-and-health questions, but as I
21 said, it's been an awfully long time since we've
22 gotten into that.
23 Q. You're still responding to smoking-and-health
24 inquiries; are you not, sir?
25 A. We do when they come up, but very, very

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1 infrequently are we asked about that subject now,
2 sir.
3 Q. And even today when you're asked about it, you
4 state that smoking doesn't cause any disease;
5 correct?
6 A. No, sir. We say that we don't believe it's been
7 established or proven that smoking causes disease.
8 We know that smoking is statistically associated with
9 disease, but we know that -- we also believe that
10 it's not been established that something causes
11 disease. And we believe we have support for that,
12 that view, in the scientific literature.
13 Q. To this day, sir, The Tobacco Institute says
14 that smoking does not cause disease. "Yes" or "no."
15 MR. BLEAKLEY: Asked and answered, Your
16 Honor.
17 THE COURT: I think it's been asked and
18 answered.

19 BY MR. CIRESI:
20 Q. You say that --
21 You say there's a statistical association; is
22 that right?
23 A. Yes, sir.
24 Q. Now do you know or have you spoken to anyone in
25 the medical field as to when a statistical
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1 association becomes cause and effect?
2 A. Well I think there are some things that people
3 in -- in medicine and science have suggested they
4 would like to see before they can judge that a
5 cause-and-effect relationship exists. For example,
6 they would like to know the basic mechanism for the
7 causation of the disease; in the case of cancer, why
8 a previously healthy cell sometimes becomes
9 malignant.
10 Q. What else would they like to see, sir? A
11 mechanism. What else?
12 A. Well I think that's the -- one of the
13 demonstrations. Perhaps one of the basic questions
14 that scientists have had over the years about whether
15 smoking causes disease; that is, no one's ever been
16 able to describe the mechanism.
17 Q. Sir, what else do doctors look to to determine
18 cause and association from statistical -- or cause
19 and effect from statistical association?
20 If you know. If you don't, just tell me you
21 don't know.
22 A. My only experience is with smoking and health,
23 and beyond that I wouldn't know, sir.
24 Q. Do you know if they look to the consistency of
25 the association?

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1 A. I know that that's one thing that some people
2 have noted as they believe in their judgment's
3 important.
4 Q. Do you know if they look to the strength of the
5 association?
6 A. Again I believe that's one thing that some
7 people who've studied this look at and believe is
8 important.
9 Q. Do you know if they look to the specific --
10 specificity of the association?
11 A. That I believe is also something that they look
12 to and might believe important.
13 Q. Do you know if they look to the temporal
14 relationship of the association?
15 A. I believe so, yes, sir.
16 Q. Do you know if they look at the coherence of the
17 association?
18 A. I believe so, yes, sir.
19 Q. And what do you understand the coherence of the
20 association to be, sir?
21 A. I don't know that I understand that scientific
22 term very well, sir.
23 Q. Do you understand what the temporal relationship

24 of the association is?
25 A. I have heard the phrase, but I've never heard it
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1 described.
2 Q. So you don't know what it is; do you?
3 A. I've not heard it described.
4 Q. Do you know what the specificity of the
5 association is?
6 A. Again, that's a scientific term that I'm not
7 familiar with. I've heard it described, but I've --
8 I've -- I've heard it said, I've not heard it
9 described.
10 Q. Do you know what "the strength of the
11 association" means?
12 A. No, sir.
13 Q. Do you know what "the consistency of the
14 association" means?
15 A. No, sir.
16 Q. So you really don't know any of the criteria
17 that the medical world uses in defining cause and
18 effect; do you, sir?
19 A. I don't know if what you've described could
20 fairly be said to be the medical world's view of how
21 statistics can be translated into a cause-and-effect
22 relationship.
23 Q. Have you ever had a personal conversation with a
24 doctor, whether smoking causes disease?
25 A. Yes, sir.

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2711

1 Q. Now when you asked for information with regard
2 to health questions from the PR people who get it
3 from companies, have you asked to see any documents
4 of the companies?
5 A. No, sir.
6 Q. Have you ever been exposed to any documents of
7 the companies?
8 A. Well certainly from time to time we would get
9 documents from our member companies which might --
10 might describe material that they were preparing to
11 release to the public in a news release, for example.
12 Q. Did anybody ever tell you you couldn't have
13 company documents?
14 A. If your question is did -- did I ask for any
15 specific document and was turned down, the answer is
16 no.
17 Q. Did anybody ever tell you you could not have
18 access to company documents?
19 A. By "company documents," if you mean internal,
20 private correspondence and memoranda, we wouldn't as
21 a matter of general course have access to those in
22 our business.
23 Q. Well your business is disseminating information
24 about the tobacco industry; correct?
25 A. Part of our business is to disseminate the
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1 perspectives of our member companies on -- on issues,
2 yes, sir.
3 Q. And one of those issues is smoking and health;
4 correct?
5 A. One of the issues we occasionally address is
6 smoking and health, yes, sir.
7 Q. All right. Now with regard to that issue, let's
8 just deal with smoking and health. Have you been
9 told that you cannot have access to scientific
10 information within the company?
11 A. I don't recall ever making a specific request
12 for any particular document in the company.
13 Q. I'm not asking if you made a request. I'm
14 asking if you were told that you could not have
15 access to them.
16 A. I don't remember one way or another about that,
17 sir.
18 Q. Okay. You do feel, do you not, that people have
19 the right to the whole truth about smoking?
20 A. Certainly.
21 Q. In fact, you believe it's important for the
22 American people to have the right to the whole truth
23 about smoking; don't you?
24 A. I believe that people ought to have as much
25 information as they can get, yes, sir.

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2713

1 Q. Well my question was a little different.
2 You believe it's important for the American
3 people to have the right to the whole truth about
4 smoking; correct?
5 A. Yes, sir.
6 Q. Now would you agree, sir, that a manufacturer
7 who is making a product has more information about
8 that product than anyone else in the world?
9 A. As a general proposition, I imagine that's
10 probably true.
11 Q. And you would agree that manufacturers, and
12 specifically the tobacco industry, has a duty to the
13 American people to research its product; wouldn't
14 you?
15 A. I'm sorry, sir, did you say the Institute or the
16 industry?
17 Q. The industry.
18 A. The industry has a duty to research its product?
19 Q. Yes.
20 A. Yes, sir.
21 Q. To find out what its risks are; correct?
22 A. If you're asking me a legal question, I -- I
23 don't know, I'm not a lawyer.
24 Q. That's not what I asked you.
25 Do you feel the companies have a duty to find

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1 out what the risks of their product are?
2 A. I personally?
3 Q. Yes.
4 A. Yes, sure. I think that's -- that's something

5 that any company would probably be interested in.
6 Q. And would you agree, sir, in your position as
7 vice-president of communications, that the cigarette
8 companies have a duty to research the risks of their
9 product?
10 A. No, I don't know that I know what their duty is.
11 But I think that the risks of -- of smoking are
12 pretty well understood by people.
13 Q. That's not what I asked you.
14 A. And I think that -- I think that anybody who
15 makes a consumer product certainly has an interest in
16 understanding what its possible risks might be.
17 Q. Not only an interest, but they would have a duty
18 to find out what the possible risks are; correct? In
19 your judgment.
20 A. I don't know if there's some legal implication
21 to the word "duty." That sounds like there is from
22 the way you're using it, but --
23 Q. Just --
24 A. -- I think I'm comfortable with what I had.
25 Q. Yeah. It's not a trick question. I'm just

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1 wondering whether you feel that manufacturers,
2 specifically the cigarette industry, has a duty to
3 look into research to find out what the risks of its
4 product are? It's a simple question.

5 MR. BLEAKLEY: Your Honor, I think the
6 witness has answered to the best of his ability.

7 THE COURT: I'll allow him to answer. You
8 may answer.

9 THE WITNESS: I beg your pardon?

10 THE COURT: You may answer that.

11 THE WITNESS: All right.

12 A. I think that if a company becomes aware that
13 there's something about its product that's possibly
14 risky, then they've got -- then they should look at
15 it and -- and then research, certainly.

16 Q. And they should tell the consumers about it;
17 right?

18 A. Oh, if there's something consumers don't know,
19 there's some breakthrough or something about the
20 product that consumers aren't aware of, I think it's
21 probably a good idea for the company to let people
22 know about it.

23 Q. How would you know whether all the consumers
24 knew or didn't know unless you told them?

25 A. I don't think it's possible for any company to

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1 know what all consumers know, but I think it's
2 certainly possible for companies to have a good
3 understanding of what its consumers know and
4 understand and believe about its product.

5 Q. But you would agree it's reasonable that a
6 company should do whatever they can do to get
7 information out so the consumers do know what the
8 company knows about its product; correct?

9 A. Well as a general proposition, I think most

10 companies would be interested in having consumers
11 know about their products, yes, sir.
12 Q. And the cigarette companies should tell the
13 public what the cigarette companies know about their
14 products; correct?
15 MR. BLEAKLEY: Objection, Your Honor, asked
16 and answered.
17 THE COURT: It's been asked and answered.
18 Q. Specifically about health risks, sir, or whether
19 they think it causes something, should the cigarette
20 companies, through you, The Tobacco Institute, tell
21 the American people what they know?
22 A. I think if -- if they became convinced of
23 something, then they would certainly let us know what
24 their position was, and we could then tell the public
25 on behalf of the industry what that particular

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1 perspective was.
2 Q. So if they became convinced. And what type of
3 convincing would be necessary, in your judgment,
4 before the cigarette industry should tell the public
5 what the risks of the product are?
6 A. I don't think that's a question I could answer.
7 I just don't know, sir.
8 Q. Have you ever asked that question?
9 A. No, sir.
10 Q. In your communications you have -- and I don't
11 mean this in an impertinent way, but you've literally
12 flooded the media with statements on behalf of the
13 industry; have you not?
14 A. Well I think I'd certainly quarrel with your use
15 of the word "flooded." We have made the news media
16 aware of the fact that we exist as an information
17 resource. Then, of course, it's up to the news media
18 to decide whether or not they even want to call us to
19 get our perspective, and then make a decision on how
20 much of the information we give them they think is
21 useful that they can disseminate.
22 Q. Well you've appeared on Ted Koppel.
23 A. Yes, sir.
24 Q. You've appeared on McNeil-Lehrer.
25 A. Yes, sir.

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1 Q. You've appeared on the NBC Nightly news?
2 A. I believe I have, yes, sir.
3 Q. You've appeared on the CBS Evening News?
4 A. Yes, sir.
5 Q. You've appeared on ABC Evening News?
6 A. I have.
7 Q. You've appeared on CNN Evening News?
8 A. Yes, I've appeared on CNN.
9 Q. You've appeared on Good Morning America?
10 A. I can't recall if I personally have, sir.
11 Q. The Tobacco Institute has.
12 A. Someone from the Institute has, yes.
13 Q. You've appeared on CBS morning shows?
14 A. Yes, sir.

15 Q. You've appeared on the Public Broadcasting
16 Corporation?
17 A. Yes, sir.
18 Q. You've appeared on radio and TV in every state
19 of the union; haven't you, sir?
20 A. That's correct.
21 Q. You've appeared here in Minnesota; haven't you?
22 A. Yes, sir.
23 Q. In fact, you have an office here in Minnesota;
24 isn't that correct?
25 A. The Institute maintains a regional office in --
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1 in Minnesota, yes, sir.
2 Q. And on all those shows that you've been on you
3 have conveyed the industry's message with regard to
4 smoking and health; haven't you?
5 A. No, sir, I wouldn't say that's at all true,
6 because in many cases the reporter isn't interested
7 in smoking and health and part of the reason we're
8 there is to try to respond to their questions, and
9 their questions come from what they understand to be
10 the community's concern about a particular issue. I
11 can't direct that.
12 Q. Well are you saying that when you've appeared on
13 all these shows, the questions did not involve
14 smoking and health?
15 A. Well I believe your question said something like
16 all of my appearances involved smoking and health.
17 My only -- my only intent was to try to let you and
18 the jury know that that's not necessarily the case,
19 sir.
20 We do respond to questions as they're asked of
21 us, but in not all of those occasions were
22 smoking-and-health issues raised.
23 Q. You've appeared, sir, in all of those programs
24 at one time or another and have discussed, among
25 other things, the issue of smoking and health; have
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1 you not?
2 A. We have discussed the issue of smoking and
3 health. I cannot sit here and tell you that in every
4 single one of those appearances you mentioned smoking
5 and health came up as an issue. I don't know that.
6 Q. And you've sent letters to the editor on the
7 issue of smoking and health?
8 A. Yes, sir.
9 Q. You have a newsletter that goes out?
10 A. We do not, no, sir.
11 Q. You did have a newsletter?
12 A. We did at one time have a newsletter. It was
13 privately circulated.
14 Q. And that dealt with smoking and health, among
15 other issues?
16 A. Smoking and health was one of the issues that
17 occasionally was dealt with in the newsletter, yes,
18 sir.
19 Q. And you are involved in the placement of feature

20 articles regarding smoking and health?
21 A. No, sir.
22 Q. Never?
23 A. Perhaps in the past, but I don't recall
24 personally being involved in it. And I believe if --
25 if it ever occurred, it was before I got to the

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1 Institute.

2 Q. You use pamphlets and brochures. Institute I
3 mean, not you personally.

4 A. The Institute does distribute some pamphlets and
5 brochures. I don't recall that we have any right now
6 on smoking and health.

7 Q. You have had though; correct?

8 A. We have had, yes, sir.

9 Q. You've had films on smoking and health prepared
10 by The Tobacco Institute?

11 A. Certainly a film, perhaps two, yes.

12 Q. You've used direct mail with respect to the
13 issue of smoking and health?

14 A. I don't know that we've used direct mail, sir.
15 I don't recall that.

16 Q. You don't deny that; do you, sir?

17 A. I don't know. I simply don't know.

18 Q. Just don't know one way or the other; correct?

19 A. Correct.

20 Q. You've used press kits on the issue of smoking
21 and health?

22 A. Well let's see. I believe so, but it would have
23 been quite some time ago.

24 Q. You've used Op Ed pieces in newspapers across
25 the country regarding the issue of smoking and

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1 health?

2 A. We may have submitted an Op Ed piece to a
3 newspaper or -- or several newspapers on the
4 smoking-and-health issue. Usually that comes at the
5 request of the paper.

6 Q. You've given congressional testimony about
7 smoking and health?

8 A. Representatives of the Institute have testified
9 before Congress, yes, sir.

10 Q. And you've given slide presentations on smoking
11 and health?

12 A. You know, I don't specifically remember a slide
13 presentation, sir. It's possible. I just don't
14 know.

15 Q. You just don't recall one way or the other right
16 now.

17 A. I don't know. I don't remember it was part of
18 anything that I've been exposed to at the Institute.

19 Q. Now all of these press releases, do they have to
20 be cleared by lawyers?

21 A. As a general course of business we ask our
22 attorneys to review all press releases for accuracy.

23 Q. Have you ever called a medical doctor and said,
24 "Is this accurate?" You yourself.

25 A. Well we from time to time have had, either as
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1 consultants or on staff, experts in this area of
2 smoking and health, and they've reviewed press
3 statements, yes, sir.

4 Q. I'm asking if you have ever called a doctor and
5 said, "Is this accurate?"

6 A. Yes, sir.

7 Q. Okay. And these would be people you had on
8 staff.

9 A. On staff or as consultants, yes, sir.

10 Q. Okay. Now you want the American people to
11 believe what you say about the tobacco industry and
12 on the issue of smoking and health; correct?

13 A. Well yes, sir, we'd certainly like people to
14 believe what we say on -- on any issue.

15 Q. That's part of the purpose of getting out this
16 information; isn't that right, sir? You want people
17 to believe it?

18 A. We certainly want people to understand our
19 perspectives and believe what we're saying, yes, sir.

20 Q. And in fact part of the purpose of getting this
21 information out is you're intending to do that so
22 that people will believe what you say; isn't that
23 right?

24 A. I think, like anyone, we'd certainly like people
25 to believe what we're saying, certainly.

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1 Q. And -- and that's the intent of getting this
2 information out; correct, sir?

3 A. Part of the reason we respond to any -- on any
4 issue is to -- is to get information out so that
5 people can know and understand our perspective, and
6 yes, believe it.

7 Q. Is the answer yes, that you then intend people
8 to believe it?

9 A. Certainly. Yes, sir.

10 Q. Thank you.

11 Can you turn, sir, to Exhibit 30210, which is in
12 volume two in front of you. This is in evidence,
13 it's the Frank Statement to Cigarette Smokers issued
14 on January 4th, 1954.

15 You have seen this before; have you not?

16 A. Yes, sir, I have.

17 Q. And you endorse and accept as a member of The
18 Tobacco Institute the undertakings set forth therein
19 by the tobacco industry; correct?

20 A. Well I certainly think that when this was issued
21 in 1954, long before I got to the Institute,
22 obviously, it was something that the people in the
23 tobacco industry thought that the American public
24 ought to read and ought to know about.

25 Q. But -- that wasn't the question, but I'll follow

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1 up on that.
2 The industry wanted people to read this;
3 correct?
4 A. Yes, sir.
5 Q. The industry intended for people to read this;
6 correct?
7 A. I -- I assume so. I mean I don't know what the
8 industry's purpose was since I wasn't associated with
9 the industry at the time. But you'd have to make an
10 assumption and say yes.
11 Q. Well, and you familiarized yourself with the
12 nature of the industry at the time that you started
13 at The Tobacco Institute; didn't you?
14 A. Yes, sir.
15 Q. You looked at the history of it in order to
16 educate yourself with regard to the industry that you
17 were going to be undertaking responsibilities on
18 behalf of?
19 A. Yes, sir.
20 Q. You looked at statements that had been made by
21 the industry in the past; correct?
22 A. I did.
23 Q. You wanted to make sure you were consistent with
24 those statements; correct?
25 A. I don't know if that was in my mind when I did

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1 that -- that reading, but certainly I wanted to know
2 what the industry's views were on issues of
3 controversy, yes, sir.
4 Q. It would be fair to state you'd want to be
5 consistent with what the industry had said; correct?
6 A. In -- in my public statements I certainly, on
7 behalf of the Institute, I certainly want to be
8 consistent, yes, sir.
9 Q. And when you speak on behalf of the Institute,
10 you're speaking on behalf of the tobacco industry;
11 aren't you, sir?
12 A. I'm speaking on behalf of our member companies,
13 the -- the cigarette manufacturers, yes, sir.
14 Q. Now going back to this document in the Frank
15 Statement, do you endorse and accept the undertakings
16 set forth therein?
17 A. I don't have any reason to quarrel with any of
18 the points made here, no, sir.
19 Q. Is your answer yes?
20 A. As far as it goes, yes, sir.
21 Q. Thank you.
22 So you accept on behalf of the industry, when
23 you speak for it, an interest in people's health as a
24 basic responsibility, paramount to every other
25 consideration in the tobacco industry's business.

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1 Correct?
2 A. Certainly at the time this advertisement was
3 issued, that was something that the authors and the
4 supporters, sponsors of it thought was extremely
5 important. Today certainly health concerns, health

6 issues raised about smoking are important, but based
7 on the inquiries we get from the news media, they're
8 not as important as they may once have been in terms
9 of how people view them as -- as important issues, --
10 Q. Well we'll get to that.

11 A. -- issues of controversy.

12 Q. We'll get to that. And we'll get to whether
13 that's true for youth as it is for adults. We'll get
14 to that. Okay?

15 A. All right.

16 Q. But that wasn't my question, sir. My question
17 is this: Do you on behalf of the industry accept an
18 interest in people's health as a basic
19 responsibility, paramount to every other
20 consideration in the industry's business?

21 A. I certainly believe that health concerns are
22 very important. I don't know if I'd use the word
23 "paramount." I might, I might not.

24 Q. Well here --

25 A. But I think that the general expression of you
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1 here is -- is one that I would share, and that is
2 that health concerns are very important, yes, sir.
3 Q. But that's not what I asked. I asked whether or
4 not you consider them paramount, number one in your
5 business.

6 MR. BLEAKLEY: Objection, Your Honor. I
7 think the witness has answered the question to the
8 best of his ability.

9 THE COURT: No, you may answer it.

10 A. I think that health concerns are extremely
11 important with a product like tobacco that's been
12 condemned for so long. Paramount? Well certainly
13 it's important, but I don't know if "paramount" is a
14 word I personally would use.

15 Q. I just changed it for you. I said --

16 A. I'm sorry?

17 Q. -- number one. Do you consider it number one,
18 the number-one interest that the industry should
19 have? Would you agree with that?

20 A. I think it's an important interest. I don't
21 think I can sit here and tell you that I believe that
22 it is the number-one interest of -- of any industry
23 or the tobacco industry.

24 Q. Now --

25 A. Certainly we're concerned about the health
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1 allegations that have been made against the product,
2 but I don't know that I can tell you I believe it's
3 the number-one issue. I don't know that I'd
4 necessarily argue with it, but --

5 Q. I'm not asking you to argue with it, Mr.
6 Merryman. You're the vice-president in charge of
7 communications for this industry. I'm simply asking
8 a very simple question. And if you don't, just say
9 no. Okay?

10 Do you consider people's health as the

11 number-one interest for this industry? "Yes" or
12 "no?"
13 MR. BLEAKLEY: Objection, asked and
14 answered, Your Honor.
15 THE COURT: You may answer that. That
16 hasn't been answered yet.
17 A. I think that it's an extremely important issue.
18 I don't know if it's the number-one issue or not,
19 sir.
20 Q. All right. Let's talk about what other interest
21 the industry has. Profits?
22 A. Certainly the interest -- the industry's
23 interested in being profitable.
24 Q. Okay. Is profits or are profits more important
25 than health in your judgment?

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1 A. I can't say that, no, sir.
2 Q. Okay. What other interests does the industry
3 have?
4 A. Well from my perspective, as someone who works
5 for the industry's trade association, we're
6 interested in getting to the public and the news
7 media the perspectives that we have on issues.
8 That's the -- the interest that I'm focused on most
9 often and continually.
10 Q. Well are your perspectives that you have on
11 issues more important than the consumers' health --
12 A. Oh, I don't think so.
13 Q. -- who use your product?
14 A. I don't think so.
15 Q. Okay. So profits aren't more important,
16 perspectives aren't more important. What other
17 considerations are there in the industry besides
18 profit and perspectives?
19 A. If -- if there are others, they don't come to
20 mind immediately, sir.
21 Q. All right. So any of the ones that you can
22 think of are health, profits and perspective. Those
23 are the only ones you can think of; correct?
24 A. As I sit here, yes, sir.
25 Q. And of those three, the most important, the

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1 paramount one is health; correct, Mr. Merryman?
2 A. Put that way, I can't argue with you, no, sir.
3 Q. And the industry has never ever retracted that
4 statement; have they?
5 A. No, the industry has not, to the best of my
6 knowledge, sir.
7 Q. And that statement was made here in Minnesota to
8 the people of this state; wasn't it?
9 A. Yes, sir.
10 Q. And you said a little bit ago that you feel
11 people have the right to the whole truth about
12 smoking; correct?
13 A. Yes, sir.
14 Q. In fact, you were -- if I might say --
15 highlighted in an ad with respect to that; correct?

16 A. I -- my image has been in advertising, yes, sir.
17 Q. Well your image is you; correct?
18 A. Yes, sir.
19 Q. Okay. You've been in ads; correct, sir?
20 A. Of course I have.
21 Q. Okay. Can you turn to Exhibit 14360.
22 THE COURT: We'll take a short recess at
23 this time.
24 MR. CIRESI: All right.
25 THE CLERK: Court stands in recess.

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1 (Recess taken.)
2 THE CLERK: All rise. Court is again in
3 session.
4 (Jury enters the courtroom.)
5 THE CLERK: Please be seated.
6 THE COURT: Counsel.
7 MR. CIRESI: Thank you, Your Honor.
8 BY MR. CIRESI:
9 Q. Mr. Merryman, could you please turn to Exhibit
10 14360 in volume one.
11 A. Yes, sir.
12 Q. This is an ad of The Tobacco Institute which was
13 placed in newspapers across the country?
14 A. No, sir, it was placed in trade magazines for
15 the news media.
16 Q. Parade Magazine goes into newspapers around the
17 country; does it not?
18 A. No, I didn't say "Parade." I said "trade
19 magazines."
20 Q. Trade magazines. I'm sorry.
21 That's you on it; isn't that right?
22 A. Yes, sir.
23 Q. Okay. You're on --
24 A. Old, old photo, sir.
25 Q. Well you look pretty good.

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1 A. Thank you.
2 Q. Can we turn to Exhibit --
3 MR. CIRESI: Can we offer, Your Honor,
4 then, Exhibit 14360.
5 MR. BLEAKLEY: No objection.
6 THE COURT: Court will receive 14360.
7 BY MR. CIRESI:
8 Q. Now you say here that "I'll fill in the
9 government's blanks;" correct?
10 A. Yes, sir.
11 Q. Do you know when this was disseminated in the
12 trade magazine?
13 A. This would have appeared in perhaps the late
14 1970s, early 1980s. 1980 perhaps.
15 Q. Okay.
16 A. Again, it was in magazines that went to
17 broadcasters.
18 Q. And by "broadcasters," you mean NBC, CBS, ABC?
19 A. I assume that some people at networks would have
20 gotten them. People at local television and radio

21 stations as well.
22 Q. Right here in Minnesota; correct?
23 A. I don't know the subscription lists, but it's
24 possible.
25 Q. It was intended to be a broad dissemination to
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1 all those who were on the subscription list; correct?
2 A. Yes, sir.
3 Q. And you intended people to rely on what you said
4 here; correct?
5 A. We certainly wanted people to believe what we
6 were saying in the advertising, yes, sir.
7 Q. Sure. And you intended for them to rely on what
8 you were saying in the advertising; correct?
9 A. I don't know what the word "rely" means, but I
10 know what the word "believe" means, so I'll stick
11 with that.
12 Q. You've never heard the word "rely?"
13 A. I have heard it, yes, sir.
14 Q. What do you think it means?
15 A. I don't know what -- what you think it means,
16 but I'm comfortable with the word "believe," so
17 that's what I would like to stick with.
18 Q. Well let me just see if we can communicate with
19 you. What do you think "rely" means? Just give me
20 your definition.
21 A. Oh, it could mean a lot of things, but I think
22 one thing it could mean is that people who rely on
23 something take some sort of action based on what you
24 say.
25 Q. And they take some action based on what you say
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1 because they believe what you're saying is true;
2 correct?
3 A. I assume that they'd believe what you said if
4 they took some action based on what you said.
5 Q. And that's what you intended by this
6 advertising, for people to take some action based on
7 their belief in your truth; correct?
8 A. What we expected -- or hoped rather than
9 expected, was that some people in the news media
10 would call and ask for our perspectives and might
11 then use those in news stories along with
12 perspectives of other people, news stories they were
13 preparing on any subject having to do with tobacco,
14 any story having to do with tobacco.
15 Q. But that they would take action based on their
16 belief in what you said; correct, sir?
17 A. The action we were hoping they would take was to
18 call -- pick up the phone and call and ask us for our
19 perspectives.
20 Q. And you wanted them to believe in what you said
21 in these perspectives; correct?
22 A. Well the specific impact of this ad, the reason
23 for this ad was to encourage people in the news
24 business to call us for our perspectives. I don't
25 think there's anything in this ad that you can fairly

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1 say is an attempt to convince somebody in the news
2 media that we were right and nobody else was.
3 Q. We'll get to that. Right now I'm just trying to
4 get a definition agreement between us.

5 You said "rely" was people take action based on
6 the belief in what you say; correct?

7 A. Yes.

8 Q. That's your definition of "rely;" correct?

9 A. That's -- that's one that came to me, yes, sir.

10 Q. I'll accept it. Okay? People will take action
11 based on belief in what you say.

12 A. Yes, sir.

13 Q. And the action you wanted them to take in this
14 particular case was to call you and get your
15 perspectives; correct?

16 A. That's correct, sir.

17 Q. Then you wanted them to believe in the
18 perspectives that you gave them; correct?

19 A. Well in this case we wanted the news media to
20 believe that we were a source of information that
21 they could include in their stories, presumably along
22 with other sources of information.

23 Q. And you wanted to fill in the government's
24 blanks; correct?

25 A. Yes, sir. That's what the headline says.

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1 Q. This was right after this 1979 Surgeon General's
2 report; wasn't it, sir?

3 A. I don't remember the exact date of the
4 advertisement, sir.

5 Q. You said it was the late '70s or 1980. I'm
6 trying to give you a point of reference. Do you
7 recall that there was a Surgeon General's report in
8 1979?

9 A. There was.

10 Q. And does that refresh your recollection that
11 this ad went out after the Surgeon General's report
12 because you wanted to fill in the government's
13 blanks?

14 A. If this ad appeared -- and I'm not certain of
15 the date that it appeared -- if this ad appeared in
16 1980 or whenever, certainly one of our goals was, as
17 it says, to fill in the government's blanks.

18 Q. Because you wanted and you think the American
19 public has the right to the whole truth; correct?
20 That's what you say.

21 A. Are you reading from the ad?

22 Q. I am. Not because --

23 A. That's correct.

24 Q. Thank you.

25 Now you think it's important that someone get

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1 out the whole truth; don't you?

2 A. I think it's important that the public get the
3 whole truth.
4 Q. And the public should get the whole truth from
5 the company about what it knows about its products;
6 correct?
7 A. I don't think the public's going to get the
8 whole truth on a subject from the company. They're
9 going to get information from lots of other sources
10 as well.
11 Q. Well --
12 A. In our case, The Tobacco Institute might be one
13 of those sources.
14 Q. Well that's sort of cutting a fine line. Let me
15 see if I can understand what you're saying.
16 They should get the whole truth about what the
17 company knows about its product; correct?
18 A. If that -- if that means that --
19 Well let me say that I'd like you to repeat the
20 question.
21 Q. I certainly will.
22 You believe that people are entitled to get the
23 whole truth from the company about what it knows
24 about its product; correct?
25 A. As a general proposition, I don't think I can

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1 argue with that, no, sir.
2 Q. And you would agree, would you not, Mr.
3 Merryman, that the greater the risk, the greater the
4 risk that a product may present to a user, the more
5 reasonable it is to assume that that manufacturer
6 will get out the whole truth about the product?
7 Isn't that right?
8 A. Well certainly in the case of cigarettes, for
9 example, people were very much aware of the risks
10 that are associated with the product. Generally
11 speaking, if there are risks to be associated with a
12 consumer product, people should know about them.
13 Q. But that wasn't my question, sir.
14 You would agree with me, would you not, that the
15 greater the risk in using the product, the more
16 important it is that a company get out all of its
17 information that it has regarding those risks to the
18 person who's going to use the product? You'd agree
19 with that.
20 A. If those risks aren't well known and understood
21 or accepted by the public, certainly then -- then I
22 think the company should tell people what it knows
23 about risks.
24 Q. Well you mean the company can sort of make a
25 determination whether somebody knows it or not and

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1 how many know it before they get out what they know
2 about the product?
3 A. Well as I said -- as I said a moment ago, I
4 think that people are very well aware of the risks
5 associated with smoking and tobacco products, and I
6 assume that's what you're asking about.

7 Q. I'm just asking generally right now. I didn't
8 even mention tobacco products right now. Let's try
9 to just get to this question.

10 Would you agree that the greater the risk a
11 product poses to the consuming public, the greater
12 the responsibility for the company to get out what it
13 knows about the product? Simple question.

14 A. As a -- as -- as a general proposition, it seems
15 to me that I -- I could probably accept that. I
16 don't know precisely what any individual company's
17 responsibility is with respect to revealing risks it
18 may think might be there, but I certainly know that
19 the public is very well aware of the risks associated
20 with smoking.

21 Q. Certainly if a company thinks something's beyond
22 a reasonable doubt, they should get it out; correct?

23 A. I can't make that judgment for a company, sir.

24 Q. You don't know one way or the other?

25 A. I can't make that judgment for a company.

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1 Q. Well can you make that judgment for a tobacco
2 company as to whether they should get out information
3 if they thought the risk was beyond all reasonable
4 doubt?

5 A. That really isn't my job. That's not what I'm
6 supposed to do at The Tobacco Institute. If you're
7 asking me personally do I think that companies ought
8 to reveal information that people don't already know
9 or aren't already aware of, as a general proposition
10 I'd say yes, that's a good idea.

11 Q. If it's not your job, Mr. Merryman, whose job is
12 it with regard to disseminating -- disseminating that
13 information to the tobacco industry? Whose job is
14 it?

15 A. Well in the case of health risks associated with
16 smoking, I think that a wide variety of public health
17 authorities for many, many years have done an
18 extraordinary job of giving people information about
19 the health charges against smoking.

20 Q. Whose responsibility is it on the part of the
21 company, sir?

22 A. I don't know that, sir.

23 Q. Is it the CEOs?

24 A. I don't know that, sir.

25 Q. Is it the vice-president in charge of
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1 operations?

2 A. I don't know that, sir.

3 Q. Is it the scientists who work in the research
4 labs?

5 A. Again, sir, I don't know.

6 Q. But you do know, based on your own experience in
7 industry, that the responsibility, the buck stops
8 with the chief executive officer; isn't that true?

9 A. As a general proposition, that's true in any
10 company, I think.

11 Q. So that you would agree, then, in the tobacco

12 companies it was the responsibility of the CEOs;
13 wouldn't you?
14 A. Well I think that the CEOs of every company,
15 tobacco or non-tobacco, have responsibilities in this
16 area.
17 Q. Okay. And I'm talking about --
18 A. I don't think it's up to me to attempt to define
19 what that responsibility should be for any company or
20 any industry.
21 Q. Did you ever ask any of the CEOs of the
22 companies that you work for what they knew about the
23 health hazards of smoking? Did you ever ask that?
24 A. Did I ever ask any of the CEOs of our member
25 companies --

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1 Q. Yes.
2 A. -- what they knew about --
3 Q. Yes.
4 A. -- the health charges against tobacco?
5 No, sir.
6 Q. Did you ever ask Mr. Kornegay to do it?
7 A. I never made that request to Mr. Kornegay, no,
8 sir.
9 Q. Did you ever make that request to Mr. Chilcote?
10 A. No, sir, I never did.
11 Q. You did know that you were using all this --
12 these media avenues to get out the companies'
13 perspective to the American people; didn't you?
14 A. We were attempting to get out a number of
15 perspectives that the companies have on a wide
16 variety of issues. Smoking and health is one of
17 those issues. We thought that we had developed
18 policies on these issues and perspectives on these
19 issues that had support within the scientific
20 community.
21 Q. And one of those perspectives, if we could look
22 at the Frank Statement, Exhibit 30210, is that the
23 industry believed the products we make are not
24 injurious to health; correct?
25 A. That's what it says in that advertisement in

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1 1954, yes, sir.
2 Q. And you still believe that today; correct? You.
3 You, sir.
4 A. I cannot say that, no, sir.
5 Q. You don't believe that.
6 A. I don't believe that we know that, no, sir.
7 Q. Has the industry ever retracted that statement?
8 A. What statement?
9 Q. That we believe our products are not injurious
10 to health.
11 A. What we've said, sir, is we believe there is a
12 statistical association between the products our
13 member companies make and health claims.
14 Q. That's not what I asked.
15 Did the companies ever retract the statement:
16 We believe the products we make are not injurious to

17 health? If you know.
18 A. I'm not aware of any specific retraction of that
19 sentence, no, sir.
20 Q. And indeed right up to today you're not aware of
21 any type of retraction of that statement; are you?
22 A. Not in specific, but we certainly do say that we
23 think smoking is risky.
24 Q. Now when you talk about the whole truth of the
25 company, that would be the truth that would flow from

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1 the research and development areas of the company;
2 correct?
3 A. I don't speak of the whole truth of a company,
4 sir.
5 Q. Well you said the American public has the right
6 to the whole truth.
7 A. That's correct.
8 Q. And I thought we agreed that a company has an
9 obligation to get out the whole truth that it knows
10 about its product, regardless of whether somebody can
11 find something out someplace else. Isn't that right?
12 A. Well I think that -- I think certainly people
13 have a right to expect information from a company
14 about a consumer product if that information isn't
15 already available someplace.
16 Q. You mean if it's available, for example, in a
17 medical journal, a company doesn't have to get out
18 the information?
19 A. No. If it's available in Reader's Digest or
20 Life Magazine or from your local doctor, I don't
21 think it's necessarily required that it should be
22 available from the company itself.
23 Q. So the company doesn't have a duty, in your
24 understanding, to get out the information if you can
25 find it from some other source.

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1 A. I don't know what the duty is, but it seems to
2 me that if the information is already available from
3 other sources, it's not altogether necessary for it
4 to be available from the company itself.
5 Q. Well let me ask you something. You're a
6 consumer; correct?
7 A. I am a consumer, yes, sir.
8 Q. And let's assume you have a product and there's
9 some --
10 Do you read Lancet, the medical journal?
11 A. Not on a regular basis, no, sir.
12 Q. Do you read any medical journals on a regular
13 basis?
14 A. Not regularly. I do see some of them.
15 Q. Some were brought to your attention by the
16 lawyers?
17 A. Some are brought to my attention by members of
18 the news media.
19 Q. The news media.
20 Now with regard to consumer products, do you
21 read the medical journals?

22 A. No, sir.
23 Q. Now you rely on the companies, don't you, to
24 tell you what they know about their product?
25 A. I certainly would like to receive information
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1 from the companies about consumer products. I also
2 read magazines like Consumer Reports.
3 Q. Let me ask you this question: What would have
4 the greatest impact on you, Mr. Merryman, if you read
5 something in Consumer Reports that there may be a
6 problem with a product of X company, or if X company
7 comes out and says our products have this problem?
8 What makes a bigger impact on you, sir, the admission
9 by the company or some third-party observation?
10 A. Well it depends on the nature of the problem.
11 It depends on what else -- what other information
12 might be out there. I don't think I can answer that
13 question in isolation like that.
14 Q. What if it involves disease and death attendant
15 with the use of the product and the company said our
16 product causes disease and death or some third party
17 says we think it causes disease and death, which
18 would you give more impact to?
19 A. I'd have to weigh that information along with
20 other information I have and make a judgment. You
21 know, in the abstract I don't know.
22 Q. Just can't answer that question.
23 A. I don't know what might have the most impact.
24 But in a specific situation I might be able to answer
25 that question.

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1 Q. Now I think you said that the companies, if they
2 were reasonably convinced that smoking caused
3 diseases, they should have said so; is that right?
4 A. Did you use the word "reasonably?"
5 Q. Yes.
6 A. I don't believe I used that word. I think I
7 said if they became convinced.
8 Q. They became convinced. Okay.
9 A. If they became convinced of something, then I
10 think you'd expect to hear of it.
11 Q. All right. Now I just want to see if we can
12 agree on, again, the definition. When you say
13 "became convinced," does that mean a hundred percent?
14 Does that mean everybody in the world has to agree to
15 it?
16 A. No. I think the internal consensus of the
17 company would have to be that they became convinced
18 of something.
19 Q. Okay. So there would have to be an internal
20 consensus; correct?
21 A. In --
22 Q. Of the company.
23 A. In my opinion, yes. However, I don't set policy
24 of the company in that regard.
25 Q. Now what if --

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1 A. I'm only giving you my opinion.
2 Q. I understand that.
3 Q. Okay.
4 Q. You're the spokesperson for these companies.
5 One of the spokespersons. Right?
6 A. And in this regard I'm giving you a personal
7 opinion. We're -- we're straying here into areas
8 that really don't -- really don't pertain to what I
9 do on a day-to-day basis.
10 Q. Well, if there's an internal consensus of the
11 company, you believe they should disseminate the
12 information; correct?
13 A. In my opinion, yes.
14 Q. Okay. And you think that's a reasonable
15 position; don't you?
16 A. It sounds reasonable to me, yes, sir.
17 Q. That's what you would expect as a consumer;
18 correct?
19 A. I don't have any particular expectation, but I
20 think that it sounds like a good idea. And I
21 would -- I would certainly believe that the companies
22 would act responsibly.
23 Q. What if there was an internal consensus of
24 another -- a number of companies, would that even
25 afford greater weight?

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1 A. Since -- since The Tobacco Institute operates as
2 a result of a consensus of our member companies, I'd
3 expect we would be informed about any intention on
4 the part of our members to change a policy or to
5 initiate a policy.
6 Q. But that wasn't my question. My question is:
7 If there was an internal consensus of a number of
8 companies that smoking caused a disease, you'd think
9 it would be even more important that they get that
10 information out; correct?
11 A. If the companies decided to make that policy
12 change, yes, sir.
13 Q. You'd consider it a policy; is that it?
14 A. It certainly is a policy that we believe smoking
15 has been statistically associated with disease, but
16 the cause and effect link hasn't been shown.
17 Q. Now what if the consensus -- and just the
18 consensus -- included experts outside of the
19 companies in the field and the companies themselves,
20 would that even give greater weight to the fact that
21 the information should get out?
22 A. Certainly I think that expert outside opinion is
23 important in that consideration.
24 Q. Can you direct your attention, please, to
25 Exhibit 11028. This is a report on a visit to the

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1 United States and Canada, April 17th to May 12th,
2 1958, by Mr. Bentley, Felton & Reid of B.A.T. Company

3 Ltd.
4 A. Could I have the number again, Mr. Ciresi? I
5 don't --
6 Q. Yes, I'm sorry, sir, 11208.
7 A. 11028?
8 Q. I'm sorry, 11028. I'm sorry, Mr. Merryman.
9 11028. It's in volume one, sir.
10 A. All right.
11 Q. This is a report on a visit to the United States
12 and Canada, April 17th through May 12th, 1958, by
13 Bentley, Felton & Reid of B.A.T. Company Ltd. This
14 is four years after the Frank Statement; correct?
15 A. Yes, sir.
16 Q. Have you seen this document before?
17 A. I saw it recently because you or your colleagues
18 indicated that you wanted to ask me about it. I --
19 I -- I looked it over briefly.
20 Q. So the lawyers showed it to you because we gave
21 them notice that we were going to ask you about this
22 document; right?
23 A. Yes, sir.
24 Q. First time you saw that document?
25 A. I may have seen it in my deposition last year.

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1 Q. Okay. Now can we go to the itinerary page. Now
2 you see here that these individuals visited with a
3 number of companies and medical institutions during
4 this trip in 1958; correct?
5 A. That's what it indicates.
6 Q. And one is American Tobacco Company, which is
7 and has been at times one of your member companies;
8 correct?
9 A. American has been a member, yes.
10 Q. Okay. And you see Mr. Hanmer and Mr. Harlan and
11 Mr. Harlow there; correct?
12 A. Correct.
13 Q. Do you know what positions those individuals
14 held?
15 A. No, sir. This was, as you pointed out, 1958,
16 long before I came to the Institute.
17 Q. Almost what, 23 years before?
18 A. Eighteen.
19 Q. Twenty-eight years.
20 A. Eighteen.
21 Q. Eighteen. Excuse me, 18 years before.
22 Did you ask the lawyers who they were?
23 A. I never heard of the names. No, sir.
24 Q. Well when you looked at the document, did you
25 ask the lawyers what positions these individuals

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1 held?
2 A. I don't recall doing so.
3 Q. Did they offer you the positions that they held?
4 MR. BLEAKLEY: Objection, Your Honor.
5 THE COURT: Sustained.
6 Q. Did you make any attempt to ascertain what
7 positions they held?

8 A. No, sir. I don't recall doing so.
9 Q. Medical College of Virginia, are you familiar
10 with that institution?
11 A. Generally, yes, sir.
12 Q. Do you know if they did some work for American
13 Tobacco Company, research for them?
14 A. I don't recall knowing that. If it's in this
15 document, I'm sure we'll get to it.
16 Q. Duke University, you're familiar with that?
17 A. Familiar with Duke University, yes, sir.
18 Q. Good university?
19 A. Superb. Pretty good basketball team, too.
20 Q. How did they do last night?
21 A. Not too well.
22 THE COURT: They lost.
23 Q. The Medical College of Virginia is a good
24 institution?
25 A. I really don't know anything about its
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1 reputation.
2 Q. Okay. Liggett and Meyers, familiar with them?
3 A. Yes, sir.
4 Q. They've been a member company; correct?
5 A. They have been. They're not now.
6 Q. Okay. We went into that.
7 A. We did.
8 Q. Liggett had Dr. Darkis and Dr. Bates
9 interviewed. Do you see that?
10 A. Yes, uh-huh.
11 Q. Did you make any attempt to investigate what
12 their responsibilities were?
13 A. Not that I recall, no, sir.
14 Q. Philip Morris, another member company; correct?
15 A. Yes, sir.
16 Q. Do you know what positions Mr. O'Keefe or Mr.
17 Seligman held?
18 A. No, sir, I do not.
19 Q. Okay. A. D. Little, do you know what that is?
20 A. I believe it's a research firm. That's
21 something I may have learned in preparation for this
22 case, but I don't recall exactly.
23 Q. And they did research for the tobacco companies;
24 correct?
25 A. I believe they did some work for one of the
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1 companies. I don't know how much or when.
2 Q. Did work for Liggett & Myers; didn't they?
3 A. I believe I've heard that.
4 Q. Okay. And the TIRC, you know what that is.
5 A. Yes, sir.
6 Q. And what is that, sir?
7 A. Tobacco Industry Research Committee.
8 Q. Okay. And that became the CTR?
9 A. It did, yes, sir.
10 Q. Okay. Roswell Park Memorial Institute, Yale
11 University, Biological Research Institute, Roscoe
12 Jackson Laboratory, do you know any of those

13 institutions?
14 A. I've -- I've heard of some of them, yes. Others
15 I -- I'm not familiar with.
16 Q. The Industrial -- or excuse me. The Industry
17 Technical Committee of TIRC, are you familiar with
18 that organization?
19 A. No, sir.
20 Q. Do you know it's part of TIRC, or was at that
21 time?
22 A. Well that's what it says. I wasn't familiar
23 with it.
24 Q. National Cancer Institute, you've heard of that
25 organization?

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1 A. Yes, sir.
2 Q. Johns Hopkins Hospital, you've heard of that?
3 A. I have.
4 Q. New York University, heard of that?
5 A. Yes, sir.
6 Q. And Sloan-Kettering, you've heard of that?
7 A. Yes, sir.
8 Q. And TIRC in New York, certainly you've heard of
9 Dr. Little; correct?
10 A. Yes, sir, I've heard of Dr. Little.
11 Q. And you've heard of the Scientific Advisory
12 Board of the TIRC; haven't you?
13 A. Yes, sir.
14 Q. Now can you go to the next page. The
15 introduction, number one, do you see that B.A.T was
16 seeking information on certain questions as a result
17 of its interviewing all of the people on the previous
18 page?

19 MR. BLEAKLEY: Objection to Mr. Ciresi's
20 characterization of the document. He's not -- he's
21 testifying now.

22 THE COURT: Rephrase the question.

23 Q. Do you see at the top that these individuals
24 report they were seeking information on certain
25 questions?

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1 A. That's what it says.
2 Q. Okay. And one of the questions was the extent
3 to which it is accepted that cigarette smoke causes
4 lung cancer. Do you see that?
5 A. "Causes," in quotes, as if to set it off, yes,
6 sir.
7 Q. Okay. Well does the quotes mean something to
8 you?
9 A. I don't know. It's the only thing I see there
10 that's set off that way, so --
11 Q. Okay. Now if you go down to the first
12 paragraph, it states, "With one exception (H.S.N.
13 Greene) --
14 And Mr. Greene was at Yale University; correct?
15 A. I believe he was, yes, sir.
16 Q. Okay. "With one exception...the individuals
17 whom we met believed that smoking causes lung cancer

18 if by 'causation' we mean any chain of events which
19 leads finally to lung cancer and which involves
20 smoking as an indispensable link."

21 Now he doesn't -- or the authors of this report
22 don't exclude any of these other individuals as
23 exceptions to that statement; do they?

24 A. They do not.

25 Q. And you've never seen this document before you
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1 saw it for this litigation; is that right?

2 A. To the best of my recollection that's true, yes,
3 sir.

4 Q. Okay. Now would you agree, sir, that at least
5 among these individuals in these companies there was
6 a consensus with respect to causation of lung cancer?

7 A. It's what is reported by these three individuals
8 from Great Britain. I don't know if they're
9 accurately reporting what they heard from the people
10 to whom they spoke, nor do I really understand that
11 their use of the word "causation" here is anything
12 more than statistical association.

13 Q. Is it a consensus, sir?

14 A. From these three gentlemen, yes, it is.

15 Q. No, no. They were referring to the people they
16 talked to on the previous page; correct? They say,
17 "With one exception...the individuals whom we met
18 believed that smoking causes lung cancer...." Isn't
19 that what they said?

20 A. This is the -- this is the reported judgment of
21 these three individuals who offered this report.
22 That's what I see.

23 Q. And they're reporting what these individuals in
24 the itinerary told them; correct?

25 A. Whether or not that is accurate I have no way
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1 of -- of knowing, not only because this was 1958, but
2 there isn't anything here which tells me whether or
3 not the other individuals with whom they spoke
4 endorsed this report.

5 Q. Would you think these people in writing this
6 report would intentionally lie?

7 A. I have no idea. I don't know.

8 MR. BLEAKLEY: Objection, Your Honor, he's
9 calling for speculation on the part of the witness.

10 THE COURT: Sustained.

11 Q. Well have you seen anything that would indicate
12 that these people would say other than what they
13 learned when they visited in the United States?

14 MR. BLEAKLEY: Same objection, Your Honor.

15 THE COURT: You may answer that.

16 A. I don't know these individuals. I cannot say.

17 Q. That's not what I asked. Have you seen anything
18 which would indicate that these people reported other
19 than what they learned when they came to the United
20 States? Have you seen anything?

21 A. I -- I have seen nothing about this except this
22 document.

23 Q. All right. They go on to report, do they not,
24 "In the U.S.A. only Berkson, apparently, is now
25 prepared to doubt the statistical evidence and his

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1 reasoning -- reasoning is nowhere thought to be
2 sound. Hueper of the National Cancer Institute
3 accepts that cigarette smoke is capable of causing
4 lung cancer but believes that as compared with other
5 environmental carcinogens the contribution of smoking
6 to the total mortality from lung cancer is being
7 greatly exaggerated." Do see that?

8 A. Yes, sir.

9 Q. Do you have any reason to doubt those
10 statements?

11 A. I can't vouch for it or endorse it. I don't
12 have any idea, sir.

13 Q. Can you turn to page eight. Do you remember,
14 sir, that when we were talking about statistical
15 association, you said there are factors that are
16 taken into account, although you don't know how
17 they're taken into account, when you look at
18 statistical associations in making a decision whether
19 or not there's a cause-and-effect relationship or
20 not? Do you remember that?

21 A. I believe I said that I was aware some people
22 believe those are important to consider, yes, sir.

23 Q. Okay. That was the consistency of the
24 association, the strength, et cetera; right?

25 A. And the others you mentioned, yes, sir.

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1 Q. Now in the conclusions here, do these gentlemen
2 report, after meeting with all of those individuals
3 in America and Canada, number one, "Although there
4 remains some doubt as to the proportion of the total
5 lung cancer mortality which can fairly be attributed
6 to smoking, scientific opinion in the U.S.A. does not
7 now seriously doubt that the statistical correlation
8 is real and reflects a cause and effect
9 relationship?"

10 A. You have read that accurately, yes, sir.

11 Q. Did anyone in the tobacco companies, American,
12 Philip Morris, Liggett & Myers, ever tell you about
13 this from the time you started with The Tobacco
14 Institute in 1976 right up to the present time?

15 A. I've not been made aware of this internal
16 document from British-American Tobacco, no, sir.

17 Q. Now if the three companies, Liggett, American
18 and Philip Morris, stated what is reported in this
19 document, that would certainly be a consensus among
20 them; would it not?

21 A. If the companies themselves made a decision on
22 this subject, that certainly would -- would represent
23 a consensus of a view, yes, sir.

24 Q. It would be unanimity among those three;
25 wouldn't it?

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1 A. Among those three? If -- if the companies
2 themselves decided to make that decision.
3 Q. And in order for the companies themselves to
4 make that position, the CEO of those companies would
5 have to discharge that responsibility; isn't that
6 right, sir?
7 A. I assume that that would be part of what would
8 be required, yes, sir. The CEO would have to make a
9 decision.
10 Q. And the CEOs of those companies have never made
11 that decision; have they?
12 A. Specify which decision you're talking about,
13 sir.
14 Q. That cigarette smoking causes lung cancer.
15 A. The tobacco companies have never made that
16 policy statement, no, sir.
17 Q. Because as a matter of policy they have decided
18 not to make that statement through the actions of
19 their chief executive officers; isn't that right?
20 A. I believe that statement hasn't been made
21 because it's not one that they concur in.
22 Q. Sir, that decision has been made based on the
23 decisions of the chief executive officers of those
24 companies; correct?
25 A. Well now you're asking me how these companies

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1 operate to make decisions. I don't know. You could
2 speculate, but I don't know how an individual company
3 makes a decision.
4 Q. Well you do know that it has been reported that
5 over 400,000 people a year die from smoking-related
6 diseases. You know that; don't you?
7 A. I've heard that figure, yes, sir.
8 Q. Have you ever asked anybody at The Tobacco
9 Institute whether they should maybe talk to the chief
10 executive officers and see if they have any
11 information as to whether smoking causes these
12 diseases?
13 A. It was our information from the companies and
14 from other sources that the causal connection hadn't
15 been made between smoking and health. We saw support
16 for that within the scientific literature, and I
17 don't believe that those on -- those whom we asked
18 about the -- about the subject told us anything
19 differently.
20 Q. But that wasn't my question. Did you ever sit
21 there and say, "Let's talk with these people and ask
22 them do they have any information on this?"
23 A. They were certainly aware of what our positions
24 were on their behalf, and one must assume they would
25 have told us if there was any change in that

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1 position.
2 Q. Did you ever go to Dr. Spears, who's the head of
3 Lorillard, and say, "Dr. Spears, do we have

4 information that smoking causes these diseases?" Did
5 you ever do that?
6 A. I know Dr. Spears, I've spoken with him. I
7 think he would tell me if he believed that there was
8 a change in position that was necessitated by new
9 information.
10 Q. I didn't ask you whether he would tell you if
11 there was a change in position, I asked you whether
12 you ever asked him that question.
13 A. I never asked Dr. Spears that question directly,
14 no, sir.
15 Q. Have you ever asked Mr. Bible from Philip
16 Morris?
17 A. I've never met Mr. Bible, sir, and the answer
18 would have to be no.
19 Q. Have you ever asked any of the CEOs of any of
20 the companies that question?
21 A. I don't recall ever asking them that specific
22 question, no, sir.
23 Q. Have you ever thought of asking them that
24 question?
25 A. No, sir.

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1 Q. If 800,000 people were alleged to die as a
2 result of smoking, would you have asked the question
3 then?
4 A. No, sir, because I think, absent any new
5 scientific information, there isn't any reason for
6 that position to change.
7 Q. So it would make no difference what the medical
8 community said as to how many people died. You
9 wouldn't ask the question.
10 A. Well that's not exactly what I said, Mr. Ciresi.
11 I said that absent any new scientific breakthrough or
12 information, I don't -- I don't think the policy
13 would change. But then I'm not in the position of
14 making policy either.
15 Q. What type of scientific breakthrough or
16 information do you need, Mr. Merryman, to ask the
17 question?
18 A. I need to rely on science, really, to ask
19 questions. I need to rely on science, for example,
20 to demonstrate how a normal healthy cell suddenly
21 become malignant. We don't know that, as I
22 understand it from the scientific community.
23 Q. Do you know of any reputable medical
24 organization in this country -- let's start there --
25 which has not stated that cigarette smoking causes

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1 lung cancer and other diseases? Do you know any
2 reputable medical organization?
3 A. I do not.
4 Q. The only organization that so states today is
5 the tobacco industry; isn't that right, sir?
6 A. I don't know if we are the only organization
7 that makes that statementl. However, clearly we do
8 make that statement, and I think we have support for

9 it in the scientific literature.
10 Q. You could find one article to say anything in
11 the scientific literature; couldn't you?
12 A. I'd suggest there's more than one article that
13 bears on this controversy, sir.
14 Q. Can you think --
15 So it's a controversy; is that what you're
16 saying?
17 A. Oh, yes, sir.
18 Q. You think it's a controversy today; is that
19 right?
20 A. I think tobacco has been controversial for
21 hundreds of years.
22 Q. No, no, I'm talking about whether --
23 I'm not talking about whether tobacco is
24 controversial. Nobody here is interested in
25 prohibition, sir. That's not what we're talking

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1 about. I'm talking about whether smoking causes
2 fatal diseases. That's what I'm talking about. Do
3 you understand?
4 A. Oh, yes, sir, I understand.
5 Q. Okay. Can you name one organization -- forget
6 whether it's a medical organization -- one other
7 organization other than the tobacco industry which
8 says smoking doesn't cause disease?
9 A. Well that's not what we say. We don't say
10 smoking doesn't cause disease, what we say is there's
11 a statistical association between smoking and
12 disease. We don't know if it's a causal
13 relationship.
14 Q. That's --
15 A. To answer your question directly, I don't know
16 who else takes that position, but we certainly do.
17 Q. Haven't you searched around to see if you have
18 any allies to support this controversy that you're
19 talking about? Haven't you done that?
20 A. As I said, our position, I think, is amply
21 supported in the scientific literature. The
22 positions we take certainly do have support there.
23 Q. Mr. --
24 A. Whether or not we have allies, as you put it, I
25 don't know that we do.

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1 Q. Not one, do you, sir? Not one that you can
2 name; isn't that right?
3 A. We don't have organizations outside the tobacco
4 industry that support our position, if that's your
5 question.
6 Q. Not a single one in the world; do you?
7 A. I'm not aware of any.
8 Q. Don't you think that it's fair and reasonable
9 for reasonable people to conclude that there is
10 overwhelming consensus that smoking causes disease
11 since there's only one lone soldier, and that's the
12 industry? Don't you think --
13 A. I don't know what is fair for people to

14 conclude. I think that people can make up their own
15 minds on this and other tobacco issues, and I don't
16 have to try to make them believe anything.

17 Q. I didn't ask you to try to make anybody believe
18 it. I asked you: Don't you think it's reasonable
19 for people to conclude there is no controversy?

20 A. I think it's reasonable for people to conclude
21 whatever they wish about smoking and health or any
22 other tobacco issue. I am not in a position of
23 attempting to define what's reasonable.

24 Q. But you publish in every media outlet that you
25 can the fact that the industry believes there's a

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1 controversy; isn't that right?

2 A. Well we don't publish, as such, those views in
3 every media outlet that we can. We certainly invite
4 people in the media to ask us our viewpoints. Then
5 it's up to them to decide what form it will take, if
6 any form at all, if it's published or not, will run
7 on the air or not. We have no control over that.

8 Q. You appear on the air and disseminate your
9 viewpoints; do you not?

10 A. I do. And almost always it's with an adversary,
11 someone who represents another point of view.

12 Q. Have you reviewed any information with regard to
13 what young people think the risks or hazards of
14 smoking are?

15 (Discussion off the record.)

16 A. I'm sorry, could you repeat the question, sir?

17 Q. Sure.

18 Have you reviewed or gathered any information as
19 to what young people might think about what diseases
20 smoking causes?

21 A. I'm aware that there have been reports in the
22 scientific literature about surveys of youngsters and
23 what they believe about smoking and health, yes, sir.

24 Q. Now you do know that young people are more
25 inclined to be daring, if I might use that term; do

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1 you not?

2 A. I think it's pretty well accepted that they like
3 to challenge authority.

4 Q. That they're influenced by their peers. Fair
5 statement?

6 A. Certainly kids are influenced by their peers,
7 yes, sir. That's what I understand anyway, not being
8 an expert in the field.

9 Q. And do you believe the industry should target
10 and advertise to youth?

11 A. No, sir, I don't.

12 Q. Have you felt that way since you joined The
13 Tobacco Institute in 1976?

14 A. Yes, sir.

15 Q. Have you reviewed your member companies' own
16 documents with regard to whether they targeted youth
17 or not?

18 A. I have seen from this litigation some selection

19 of internal documents from some of the member
20 companies, yes, sir.
21 Q. That targeted youth; correct?
22 A. There were some statements made in those
23 documents that -- about youth and about marketing,
24 yes, sir.
25 Q. Marketing to youth; correct?

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1 A. I'd have to look at the documents to be able to
2 say, but I have seen some documents on those
3 subjects, yes, sir.
4 Q. Do you recall that RJR made a presentation to
5 its board regarding marketing to youth?
6 A. Oh, I'd have to see that. I don't -- I can't
7 recall exactly.
8 Is there a document? I don't know what you're
9 referring to specifically.
10 Q. I'm just asking right now if you recall that,
11 sir.
12 A. I seem to, but I'd have to look at it.
13 Q. Okay, fair enough. And I will show it to you
14 later.
15 A. Okay.
16 Q. Do you recall whether Philip Morris had
17 presentations to it with respect to marketing to
18 youth?
19 A. I honestly don't.
20 Q. Do you know if Brown & Williamson had
21 information within its files which showed it marketed
22 to youth?
23 A. I seem to recall some information on Brown &
24 Williamson marketing, and it may have had something
25 to do with youth. I don't know if -- if it indicated
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1 or suggested that that was the company's intent.
2 Q. If any of these companies market to youth, it
3 would be wrong and illegal in your mind; correct?
4 A. Certainly would be --
5 MR. BLEAKLEY: Objection to the use of the
6 term "illegal," Your Honor.
7 THE COURT: Sustained.
8 Q. It would be wrong; wouldn't it, sir?
9 A. It certainly would be against the industry
10 policy --
11 Q. Okay.
12 A. -- because we don't want kids to smoke. I think
13 it would be wrong in my personal opinion.
14 Q. Well when you say it would be against the
15 industry policy, it would be against their stated
16 policy; is that right?
17 A. I think that goes without saying, sir. Yes,
18 sir.
19 Q. Now let's talk about what they actually do. If
20 they actually did that with -- regardless of whether
21 there was a stated policy not to, that would be
22 wrong; correct?
23 MR. BLEAKLEY: Objection to the form of the

24 question. I don't know what he means by "that."
25 THE COURT: Rephrase the question.

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1 Q. If the industry actually marketed to youth
2 despite a policy which stated that we don't market to
3 youth, that marketing to youth would be wrong;
4 correct?

5 A. I think it's wrong to market tobacco products to
6 kids.

7 Q. Because they don't appreciate the risks;
8 correct, sir?

9 A. I don't think kids have the maturity or the
10 judgment that's necessary to decide about a risky
11 product like cigarettes.

12 Q. And do you recall when the industry first stated
13 that cigarettes were a drug-delivery device?

14 A. The tobacco industry, sir? I don't believe the
15 tobacco industry has made a statement about that.

16 Q. It's never said that; has it?

17 A. Not to the best of my recollection.

18 Q. Ever. Anywhere. Isn't that right?

19 A. That's -- that's not something that The Tobacco
20 Institute has -- has said on behalf of its members.

21 Q. Well you believe that a cigarette is a
22 drug-delivery device; don't you?

23 A. Do I?

24 No, I don't, sir.

25 Q. You don't.

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1 Have you read any internal documents regarding
2 that issue?

3 A. I believe in this litigation I've been shown
4 some documents on that subject, yes, sir.

5 Q. Do you know if the industry has taking -- taken
6 public positions that a cigarette is not a
7 drug-delivery device?

8 A. I believe that's been our position, sir. Yes,
9 sir.

10 Q. That's another one of your positions; correct?

11 A. The Tobacco Institute takes positions on behalf
12 of the industry, sir.

13 Q. And when you take that position, you are
14 speaking for each and every member company; correct?

15 A. We speak for our member companies, yes, sir.

16 Q. And you have never seen any member company state
17 that a cigarette is a drug-delivery device; have you?

18 A. I don't believe so, no, sir.

19 Q. You have never seen a member company state that
20 they manipulate nicotine; have you?

21 A. Not that I recall, no, sir.

22 Q. The Tobacco Institute has never said that the
23 tobacco industry manipulates nicotine; correct?

24 A. That is correct, to the best of my recollection.

25 Q. Indeed, The Tobacco Institute, on behalf of the
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1 industry, has taken the opposite position; hasn't it,
2 sir?
3 A. "The opposite position" being --
4 Q. That they do not manipulate nicotine.
5 A. Yes, sir.
6 Q. And it's taken that position in order to prevent
7 it from being regulated by the FDA; hasn't it?
8 A. I don't know that I'm aware of the specific
9 reason for the position, sir.
10 Q. Well you've put out press releases from The
11 Tobacco Institute regarding that; haven't you, sir?
12 A. Oh, yes, we have. You're right.
13 Q. So you retract your previous answer; correct?
14 A. You're correct.
15 Q. Can you direct your attention to Exhibit 14452.
16 By the way, Mr. Merryman, do you personally
17 believe cigarettes causes disease?
18 A. I don't believe it's ever been established that
19 smoking causes disease, no, sir.
20 Q. I just want to know your personal opinion. Do
21 you believe cigarette smoking causes disease?
22 A. I don't know.
23 Q. Do you believe it contributes to disease?
24 A. I believe it's a risk factor, but I don't know
25 if it contributes to disease or causes disease.

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1 Q. Why did you give up smoking?
2 A. I had a heart attack and bypass surgery. I
3 decided that I wanted to avoid as many risk factors
4 as my life as I could; I gave up smoking, I started
5 an exercise and diet program, tried to take as much
6 stress out of my life as possible, I eat a low-fat
7 diet and follow the advice of my physician.
8 Q. And your physician told you to quit smoking;
9 didn't he, sir?
10 A. No, he didn't.
11 Q. He didn't?
12 A. No, he didn't. He said in my case he thought
13 that there was a very strong likelihood that family
14 history played a great part in what occurred with
15 respect to me.
16 Q. And he told you to go right on smoking after you
17 had the heart attack?
18 A. No. He said he thought that I ought to consider
19 modifying a lot of risky lifestyle behavior factors,
20 and I did that.
21 Q. And he told you you ought to consider quitting
22 smoking; didn't he?
23 A. Yes. He didn't tell me to quit smoking.
24 Q. Thank you.
25 A. I made that decision on my own.

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1 Q. But he told you to quit smoking.
2 A. No, he did not, sir.
3 Q. I misspoke. He told you you ought to consider
4 to quit smoking; correct, sir?

5 A. Yes, sir.
6 Q. Can you direct your attention now to Exhibit
7 14452. This is a press release of The Tobacco
8 Institute?
9 A. Yes, sir.
10 Q. Went to media relations; correct?
11 A. I'm sorry?
12 Q. It went to media relations?
13 A. The contact --
14 Q. That's the contact?
15 A. The contact for reporters is our media relations
16 division.
17 Q. And that's a division of The Tobacco Institute.
18 A. Yes, it is.
19 Q. Are you part of that?
20 A. Yes, sir.
21 Q. And this was for release March 25th, 1994;
22 correct?
23 A. Correct.
24 MR. CIRESI: Your Honor, we'd offer Exhibit
25 14452.

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1 MR. BLEAKLEY: No objection.
2 THE COURT: Court will receive that into
3 evidence.
4 BY MR. CIRESI:
5 Q. Now this relates to testimony that was given on
6 behalf of the industry to the House Subcommittee on
7 Health and the Environment in 1994; correct?
8 A. That is correct.
9 Q. Now in 1994 there were a number of congressional
10 hearings regarding smoking and health; correct?
11 A. There were a number of congressional hearings on
12 tobacco issues in '94, yes, sir.
13 Q. And during that time a number of Brown &
14 Williamson documents were disclosed for the first
15 time in the public; correct?
16 A. There were documents disclosed from that
17 company. I believe it was in 1994.
18 Q. Created a lot of publicity; correct?
19 A. Yes, sir.
20 Q. Information that had never been seen publicly
21 before; correct?
22 A. I believe that's true.
23 Q. Now if you can go to the second bullet point --
24 Let me ask this first: Mr. Merryman, where did
25 you get the information for this press release?

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1 A. I did not write this press release, so I would
2 have to tell you what our usual practice is.
3 Q. Fair enough. I didn't mean you personally, but
4 let me ask this question: Where did The Tobacco
5 Institute get the information that you used for this
6 press release?
7 A. It would come from our member companies.
8 Q. And did this press release go around the
9 country?

10 A. It was --
11 It would have been, under our usual practice,
12 distributed to news media outlets in Washington, D.C.
13 What they decided to do with it then is up to them.
14 We can't control that.
15 Q. So that would be like the API?
16 A. The Associated Press would have received this,
17 yes, sir.
18 Q. Who else, Reuters?
19 A. Possibly.
20 Q. Who else, do you know?
21 A. Newspaper bureaus.
22 Q. Newspaper bureaus, TV stations, networks.
23 A. The TV networks certainly would have received it
24 as well, yes, sir.
25 Q. You intended for this document to have broad

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1 dissemination throughout the country; correct?
2 A. We certainly would have sent this document, this
3 news release, to news bureaus in Washington, D.C.
4 Beyond that we wouldn't have made any distribution, I
5 don't think.
6 Q. I know, but that wasn't my question. You
7 intended this to have broad dissemination throughout
8 the country; correct?
9 A. Well certainly what we wanted was for it to be
10 received by these news organizations. After that we
11 can't control it.
12 Q. I didn't ask you whether you could control it, I
13 simply asked whether you intended for it to have
14 broad dissemination., that's all.
15 A. We certainly would like to -- like it to have
16 been a part of news stories on this subject, yes,
17 sir.
18 Q. And you would have liked it to have been news
19 stories throughout the entire country; correct?
20 A. We certainly would like -- like it to have been
21 distributed around the country.
22 Q. I mean you didn't just send it to the Duluth
23 Tribune, for example, you sent it to national news
24 organizations; correct?
25 A. That's our usual practice, yes, sir.

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1 Q. All right. Now the information, then, you --
2 you obtained from the member companies you said;
3 correct?
4 A. Yes, sir.
5 Q. And you were about to describe how you obtained
6 that information. Can you do that, please?
7 A. Well with respect to this particular news
8 release, I don't know because I didn't -- I didn't
9 prepare it. Generally speaking people at the
10 Institute would make contact with their colleagues at
11 the member companies seeking information.
12 Q. All right. Can you direct your attention to the
13 second bullet point. "Cigarette manufacturers do not
14 manipulate the level of nicotine in various brands.

15 Nicotine levels follow 'tar' levels -- as
16 manufacturers have reduced 'tar' levels and yields
17 over the years to satisfy changing consumer taste,
18 nicotine levels and yields have fallen
19 correspondingly."

20 Do you believe that?

21 A. Yes, sir.

22 Q. Have you ever looked at internal documents to
23 see whether that's accurate or not?

24 A. No, sir, but I believe that there are citations
25 in the scientific literature which show that, and I
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1 believe that's the information that we got from our
2 member companies.

3 Q. And so you believe it because you got it from
4 your member companies; right?

5 A. Yeah. And because I believe there are -- there
6 is support for it in the scientific literature.

7 Q. All right. Well do you know if they manipulated
8 the nicotine as it went down to make it more
9 effective?

10 A. I don't believe there was manipulation of
11 nicotine, sir.

12 Q. So you don't believe that there were any design
13 changes to the cigarette that would have made the
14 nicotine more effective, regardless of whether there
15 was a lower total yield or not; is that right?

16 A. Well that -- that gets into product development
17 information that I wouldn't have any access to
18 because it would be proprietary.

19 Q. Have you ever heard the term "plausible
20 deniability?"

21 A. I have.

22 Q. What does it mean?

23 A. I can't think of a -- a definition right off the
24 top of my head.

25 Q. Does it mean you don't give somebody information
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1 so they can deny things in a plausible way?

2 A. I suppose that could be a -- one definition of
3 it. There might be others.

4 Q. So you didn't get the information from the
5 individual member companies because it was
6 proprietary; is that right? That's what you said.

7 A. Any -- any product-development information that
8 has to do with products they're thinking about
9 couldn't be shared with us for antitrust reasons.

10 Q. And certainly the public didn't get their
11 proprietary information; did they?

12 A. Something that, you know, has to do with how
13 you're thinking about making a new product isn't
14 something that I would think is shared with anybody
15 outside the company.

16 Q. Well let's forget about a new product, let's
17 talk about existing products, products that were on
18 the market. They could give you that information, if
19 they were manipulating nicotine to get it to be more

20 effective, without violating antitrust laws; couldn't
21 they?

22 MR. BLEAKLEY: Objection, Your Honor, calls
23 for speculation, legal conclusion.

24 MR. CIRESI: Your Honor, he mentioned
25 antitrust laws.

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1 THE COURT: You may answer that.

2 A. I don't think any manufacturer is going to share
3 information that it considers proprietary about its
4 products outside of the company.

5 Q. And they won't share it with the public at large
6 either; will they, sir?

7 A. If it has to do with proprietary knowledge about
8 the product, trade secrets and so forth, I don't
9 think a company is going to make that information
10 public outside -- outside its company. It just
11 wouldn't make sense.

12 Q. Okay. So it wouldn't make sense, if a company
13 was manipulating nicotine to make it more effective
14 and it considered the information proprietary and
15 confidential, to provide that information to
16 Congress; correct, sir?

17 A. I don't believe, as I said before, that
18 cigarette manufacturers manipulate nicotine.

19 Q. That's not what I asked you.

20 A. And I think that any information having to do
21 with trade secrets or proprietary knowledge is
22 properly held within the company.

23 Q. So that if the --

24 And I want you to assume that cigarette
25 companies were manipulating nicotine to make it more

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1 effective and they considered it proprietary and
2 confidential. They wouldn't have to tell Congress
3 about it in your opinion; correct?

4 A. Well, you know, you might be asking for a legal
5 judgment there that I'm not qualified to make when
6 you say "they don't have to tell Congress about it."
7 I don't know that. But I think as a general
8 proposition, anybody who manufactures a product has
9 trade secrets that they're entitled to keep to
10 themselves and not share with their competitors.

11 Q. And if the nicotine --

12 And I want you to assume that the companies were
13 manipulating nicotine. You feel that they were
14 entitled to keep that secret from the public if they
15 considered it proprietary and confidential; correct,
16 Mr. Merryman?

17 A. Well you're asking me to assume a lot.

18 Q. Yes, one thing, that they manipulated nicotine.

19 A. And assume -- assume something that is --
20 something I've not thought of before. But I think
21 if -- if I have to make that assumption, then you're
22 probably right.

23 Q. So that if they kept it confidential and secret,
24 no one would know that they were manipulating

25 nicotine except the companies themselves; correct,
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1 Mr. Merryman?

2 A. If no one knew anything about how nicotine
3 levels were varied in the product, I guess you'd be
4 right.

5 MR. CIRESI: Thank you, sir. Your Honor,
6 you want to break there?

7 THE COURT: We will recess. We'll
8 reconvene Monday morning at 9:30.

9 THE CLERK: Court stands in recess, to
10 reconvene Monday morning at 9:30.

11 (Court recesses.)

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